SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 875

THE FIRST NATIONAL BANK OF LOGAN, UTAH, PETITIONER,

vs.

WALKER BANK & TRUST COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

No. C-137-63, Civil.

WALKER BANK & TRUST COMPANY, a corporation, Plaintiff,

vs.

JAMES J. SAXON, Comptroller of the Currency; and THE FIRST NATIONAL BANK OF LOGAN, of Logan, Utah, a National banking association, Defendants.

COMPLAINT—Filed July 9, 1963

1. Plaintiff is a banking corporation organized under the laws of the State of Utah. The defendant, James J. Saxon, Comptroller of the Currency (hereinafter referred to as the Comptroller), is a duly constituted officer of the Executive Branch of the Government of the United States, maintaining his official residence and place of business in the District of Columbia and is an "agency" of the said Government within the meaning of Title 5, United States Code, Section 1001. The defendant, The First National Bank of Logan, of Logan, Utah (hereinafter referred to as the Defendant Bank), is a national banking association organized and existing under the National Banking Act and is a national bank established in the State of Utah at the City of Logan in said State, which City is a city of the second class as cities are classified by the statutes of the State of Utah.

[fol. 2] This action arises under Section 36 of Title 12 of the United States Code commonly referred to as the

National Banking Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah and in the said City of Logan where it has a large investment in capital, property, equipment and good will and irreparable damage will be sustained by plaintiff unless the relief herein prayed for is granted. The amount in controversy exceeds, exclusive of interest and costs the sum of $10,000.

This is a proceeding (1) for a declaratory judgment that the issuance by the Comptroller of a certificate authorizing the establishment and operation by the Defendant Bank of a branch bank in the City of Logan, Utah, is in violation of Title 12, United States Code, Section 36; (2) to compel the said Comptroller to rescind the said certificate; and (3) to enjoin the Defendant Bank from establishing or operating such branch bank.

There is no special statutory review proceeding relevant to the subject matter of the action in any court specified by statute and the action of the Comptroller in the issuance of a certificate authorizing the establishment and operation by the Defendant Bank of a branch bank in the City of Logan, Utah, is a final agency action within the meaning of Title 5, Section 1009, United States Code.

2. Plaintiff now is and has been for many years engaged in the banking business in the State of Utah. It maintains its main office and principal place of business at Salt Lake City, Utah. On the 18th day of December, 1956, plaintiff took over and acquired the Cache Valley Banking Company by a statutory merger under and in accordance with the laws of the State of Utah whereby said Cache Valley Banking Company was merged with and into plaintiff as the resulting bank. Prior to the time when plaintiff took over and acquired the Cache Valley Banking Company it was a bank organized under the laws of the State of Utah and regularly transacting a customary banking business at its banking house located in the City of Logan, State of Utah, and upon and following said merger plaintiff

continued to transact such banking business at its banking house in the said City of Logan, which banking house, prior to the effective date of said merger, had been the banking house of Cache Valley Banking Company. Said Cache Valley Banking Company had been in operation as a bank for a period of more than five years prior to the time it was taken over and acquired by plaintiff through said merger.

[fols. 3-5] 3. The Defendant Bank, a national banking association, was on January 21, 1963, and for many years prior thereto, a national bank regularly transacting a customary banking business at its banking office in the said City of Logan, State of Utah. Prior to January 21, 1963, the Defendant Bank made application to the Comptroller for authorization to establish a branch bank in the City of Logan, Utah, and the Comptroller, on or about January 21, 1963, issued a certificate authorizing the Defendant Bank to establish and conduct a branch bank in the City of Logan with full power to conduct a general banking business at said branch bank.

4. At the time said application was made by said Defendant Bank with the Comptroller and at the time of the issuance of the said certificate of authorization by the Comptroller and for many years prior thereto, there were three banks located in said City of Logan, each regularly transacting a customary banking business: Walker Bank & Trust Company, Cache Valley Branch; the First Security Bank of Utah, N.A., Logan Branch; and the Defendant Bank.

5. Title 12, United States Code, Section 36(c) provides in part, as follows:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) *Within the limits of the city, town or village in which said association is situated, if*

such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, *if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition,* and subject to the restrictions as to location imposed by the law of the State on State banks." (Emphasis added)

Under the foregoing provision of the National Banking Act, a national banking association can only establish and operate a branch if at the time of such establishment and operation the said privilege is granted to state banks by statute law expressly granting such right and the right is subject to the same restrictions as to location as are imposed by state law on state banks.

[fol. 6] 6. Section 7-3-6, Utah Code Annotated 1953, as amended, provides in part, as follows:

"7-3-6 . . . Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank . . ."

The City of Logan, Utah, is not now and was not at any of the times referred to herein a city of the first class within the meaning of said Section 7-3-6 nor within an unincorporated area of a county in which a city of the first class is located and the Defendant Bank did not take over an existing bank for the purpose of establishing the said branch bank in the said City.

7. The action of the Comptroller in authorizing the establishment of a branch bank in the City of Logan by

the Defendant Bank is invalid, contrary to and in violation of Title 12, United States Code, Section 36(c) because the establishment of such a branch by the Defendant Bank was not authorized at the time to state banks by the laws of Utah, and the Comptroller was without legal authority to issue to the Defendant Bank his certificate of authority to establish and operate a branch in the City of Logan, Utah, and the establishment and operation of such branch bank by the Defendant Bank under the purported authority granted by the Comptroller is prohibited by and in violation of Title 12, United States Code, Section 36(c) and unless the Defendant Bank is restrained and prohibited from establishing and operating a branch bank in the City of Logan, Utah, irreparable injury and damage to plaintiff will result.

Wherefore, plaintiff prays for a judgment declaring that the action of the Comptroller in authorizing the establishment and operation by the Defendant Bank in the City of Logan, Utah, was and is prohibited by Title 12, United States Code, Section 36(c) and that the issuance of the certificate by the Comptroller to the Defendant Bank authorizing the establishment and operation of said branch is void and of no effect and that this court issue its order compelling the Comptroller to rescind the said certificate [fol. 7] and restraining the Defendant Bank from establishing or operating a branch bank in the City of Logan, Utah, under or pursuant to said certificate and that this court grant such further relief as may seem just and proper in the premises.

Joseph S. Jones, C. E. Henderson, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWER OF FIRST NATIONAL BANK OF LOGAN, UTAH—
Filed October 4, 1963

First Defense

Plaintiff's complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The court lacks jurisdiction of the subject matter of this action as the authorization by the Comptroller of the Currency for this answering defendant to establish branch bank in the city of Logan, Utah, is not reviewable by the court.

Third Defense

1. Answering the allegations grouped under No. 1 of plaintiff's complaint: This defendant admits the allegations of paragraphs one and four of said allegations numbered one, also admits that proceedings commenced by plaintiff were for: (1) a declaratory judgment, (2) to compel the Comptroller of Currency to rescind the certificate of approval issued to this defendant to establish an inside branch bank, and (3) to enjoin this defendant from operating a branch bank. This defendant denies that irreparable damage will be sustained by plaintiff unless said relief is granted and alleges that no damage will be sustained by plaintiff, in fact, under a National Emergency plaintiff may be benefited by the establishment of a new branch bank of this defendant as authorized by the Comptroller of Currency.

[fol. 8] 2. Answering paragraph 2 of plaintiff's complaint: This defendant admits that plaintiff has been engaged in banking business in the State of Utah for many years and maintains its office and principal place of busi-

ness in Salt Lake City, Utah, and that on the 18th day of December 1956 a merger agreement was executed between the Cache Valley Banking Company of Logan, Utah, and plaintiff which said agreement is now on file in the office of the Secretary of State of the State of Utah, and that prior to said agreement the Cache Valley Banking Company had been in operation for a period of more than five years prior to the date of said merger agreement.

3. Answering paragraph 3 of plaintiff's complaint: This defendant admits all of the allegations therein contained, except the said branch bank of this defendant was given power to conduct a general banking business as an inside branch bank of said defendant at 444 North Main in Logan, Utah.

4. Answering paragraph 4 of Plaintiff's complaint: This defendant alleges that at the time the application was made by defendant with the Comptroller of Currency for the issuance to it of a certificate of authorization to establish a new inside branch bank in Logan City there was in said city only one bank, the First National Bank of Logan, Utah, and two outside branch banks viz., a branch of The Walker Bank and Trust Company, and a branch of The First Security Bank of Utah NA.

5. Answering paragraph five this defendant admits that title twelve United States Code section 36-C provides as quoted in plaintiff's complaint.

6. Answering paragraph six of plaintiff's complaint this defendant admits that section 7-3-6 Utah Code Annotated contains the information as quoted in plaintiff's complaint and that the City of Logan was not a city of first class in the State of Utah at the time the certificate of authorization was issued to this defendant to establish a new branch bank.

7. Further answering plaintiff's complaint this defendant denies generally and specifically each and every alle-

gation of plaintiff's complaint not herein admitted, modified or explained.

[fol. 9] Fourth Defense

Defendant alleges that on the 18th of May, 1960, the Federal Reserve Bank of San Francisco appointed and designated this defendant, the First National Bank of Logan, as its agent to receive, verify, store, control, process and distribute Federal Reserve Notes and United States Currency during a National Emergency. That in order to properly function as said agent it became necessary for this defendant to provide additional vault facilities. That the plan of the branch bank of this defendant provides for such additional vault facilities. That, if a National Emergency occurs, the plaintiff will be benefited and not injured by the establishment of the branch bank of this defendant.

That if said certificate of authority of the Comptroller of the Currency is rescinded and this defendant is denied the privilege of providing adequate facilities to act as an agent of the Federal Reserve Bank in time of National Emergency, its efficiency to so act under Federal authority will be greatly impaired.

Fifth Defense

And as a further and separate defense defendant alleges that plaintiff ought not to be permitted to say that the Comptroller of Currency of the United States had no legal authority to issue to defendant, the First National Bank of Logan, a certificate of authority to establish a branch bank in Logan, Utah, for the reason that on about the 1st day of December, 1962, the National Bank Examiner gave plaintiff notice of the application of the First National Bank to establish a branch that the plaintiff bank stood by and made no protest and because of its apparent acquiescence in the issuance of authority to establish a branch bank this defendant has expended the sum of ap-

proximately $80,000 for a building site and architects fees for a branch bank building in which to conduct a branch banking business and to provide vault space to act as an agent of the Federal Reserve Bank of San Francisco in a National Emergency.

Sixth Defense

That portion of Section 7-3-6 which grants certain branch banking privileges to banks in cities of the first class but denies the same privileges to banks in other cities is con- [fol. 10] trary to the provisions of Article VI Section 26 of the Constitution of the State of Utah which provides among other matters that:

"The Legislature is prohibited from any private or special laws in the following cases:

In all cases where a general law can be applicable, no special law shall be enacted."

Wherefore this defendant prays that plaintiff's complaint be dismissed and the court award the defendants its costs in this action and for general relief.

Ted S. Perry, Attorney for Plaintiff.

In United States District Court

Answer of Comptroller of the Currency
Filed October 7, 1963

Defendant James J. Saxon, Comptroller of the Currency, by his attorneys, in answer to the complaint herein admits, denies and alleges as follows:

1. For lack of knowledge or information sufficient to form a belief, defendant denies the allegations contained in paragraph 1 of the complaint, except that he neither admits nor denies plaintiff's conclusions of law that the Comptroller of the Currency is an "agency" of the Government under 5 U.S.C. §1001 and that the action of the Comptroller complained of in this suit is a final agency

action under 5 U.S.C. §1009, and except that he admits that plaintiff is a banking corporation organized under the laws of the State of Utah, that the Comptroller of the Currency is a duly constituted officer of the Executive Branch of the Government of the United States maintaining his official residence and place of business in the District of Columbia, that the First National Bank of Logan is a national banking association organized and existing under the National Banking Act and engaged in the banking business in the City of Logan, State of Utah, that the City of Logan is a city of the second class as cities are classified by the statutes of the State of Utah, that this is a proceeding for a declaratory judgment and injunctive relief, and that there is no special statutory review proceeding relevant to the subject matter of the action.

[fol. 11] 2. For lack of knowledge or information sufficient to form a belief, defendant denies the allegations contained in paragraph 2 of the complaint.

3. Defendant admits the allegations contained in paragraph 3 of the complaint and alleges that the First National Bank of Logan applied to the Comptroller for authorization to establish a branch bank in the City of Logan, Utah on November 9, 1962.

4. Defendant denies the allegations contained in paragraph 4 of the complaint except that he admits that at the time the application was made by the defendant bank and at the time of the issuance of the certificate authorizing the defendant bank to establish and conduct a branch office in the City of Logan there were located in the City of Logan, each transacting a banking business, the following: a branch office of the Walker Bank and Trust Company, a branch office of the First Security Bank of Utah, and the home office of the First National Bank of Logan.

5. Defendant admits that the quotation from 12 U.S.C. §36(c), in paragraph 5 of the complaint is, except for the underscoring, accurate and he refers the Court to 12 U.S.C. §36 for the complete language of the section. Defendant

neither admits nor denies plaintiff's paraphrasing of 12 U.S.C. §36(c) but refers the Court to that section for the terms and provisions thereof.

6. Defendant admits that the quotation from Section 7-3-6, Utah Code Annotated, 1953, as amended, is accurate and he refers the Court to that section for its complete language. Defendant admits the remaining allegations contained in paragraph 6 of the complaint.

7. Defendant denies the allegations contained in paragraph 7 of the complaint.

Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

John W. Douglas, Assistant Attorney General, Harland F. Leathers, William T. Thurman, United State Attorney, R. Dickey Hamilton, Attorneys, Department of Justice, Attorneys for Defendant Saxon.

[fol. 12]

In United States District Court

Stipulation of Facts and Other Matters—
Filed May 4, 1964

The plaintiff and defendants by their respective counsel, hereby stipulate to the following facts in the above-entitled action as hereinafter set forth in paragraphs 1 to 9, both inclusive:

1. The plaintiff, Walker Bank & Trust Company, is and has been at the times hereinafter referred to and prior thereto, a banking corporation organized under the laws of the State of Utah, having its main banking house in Salt Lake City, Utah.

2. The defendant, James J. Saxon, Comptroller of the Currency (hereinafter referred to as the Comptroller), is a duly constituted officer of the Executive Branch of the

Government of the United States, maintaining his official residence and place of business in the District of Columbia.

3. The defendant, The First National Bank of Logan (hereinafter referred to as the Defendant Bank), is a national banking association organized and existing under the National Banking Act and regularly transacting a customary banking business in the City of Logan, State of Utah. The City of Logan is a city of the second class as cities are classified by the statutes of the State of Utah.

4. This is an action for a declaratory judgment and injunctive relief and there is no special statutory review proceeding relevant to the subject matter of the action.

5. On the 18th day of December, 1956, plaintiff took over and acquired the Cache Valley Banking Company by a statutory merger under and in accordance with the laws of the State of Utah, whereby said Cache Valley Banking Company was merged with and into plaintiff as the resulting bank. Prior to the time when plaintiff took over and acquired the Cache Valley Banking Company, said Cache Valley Banking Company was a bank organized under the laws of the State of Utah and regularly transacting a customary banking business at its banking house located at 102 North Main Street, in the City of Logan, State of Utah, and upon and following said merger plaintiff continued to transact, and is now transacting, such banking business at its branch bank in said City of Logan, which branch [fol. 13] bank, prior to the effective date of said merger, had been the banking house of Cache Valley Banking Company. Said Cache Valley Banking Company had been in operation as a bank for a period of more than five (5) years prior to the time it was taken over and acquired by plaintiff through said merger.

6. At the time of the commencement of this action: Plaintiff had demand and time deposits at its Cache Valley Branch in Logan, Utah, amounting to in excess of $10,000,000; it had outstanding loans in excess of $5,000,000 which has been made at said Cache Valley Branch; and it

had an investment in furniture, fixtures and leasehold improvements at the Cache Valley Branch in excess of $50,000.

7. On or about November 9, 1962, the Defendant Bank applied to the Comptroller for his approval of the establishment and operation of a branch bank by the Defendant Bank at 466 North Main Street, Logan, Utah, and on January 21, 1963, the Comptroller issued his certificate approving and authorizing the Defendant Bank to establish and operate a branch at the location above mentioned.

8. On January 21, 1963, the Defendant Bank commenced transacting a banking business at its said branch banking house located at 446 North Main Street, Logan, Utah, and thereafter on or about May 7, 1963, the Defendant Bank moved its branch banking house to a new location at 440½ North Main Street, Logan, Utah, and since said date, the Defendant Bank has been transacting a banking business at said banking house located at 440½ North Main Street, Logan, Utah. In seeking to establish said branch bank and in establishing the same, as hereinabove set forth, the Defendant Bank did not take over an existing bank. The Defendant Bank will continue to operate said branch bank, unless enjoined by the court from so doing.

9. Prior to the Comptroller's authorization for the establishment of said branch bank by the Defendant Bank, the Defendant Bank had no branches and it regularly transacted a customary banking business only at its banking house located at 99 North Main Street, City of Logan, Utah. At the time said application was made by said Defendant Bank to the Comptroller and at the time of the issuance of said certificate of authorization by the Comptroller and prior thereto, Walker Bank & Trust Company [fol. 14] and First Security Bank of Utah, N.A., were each regularly transacting a customary banking business at their respective branch banking houses located in said City of Logan, Utah.

10. It is further stipulated that each of the parties hereto reserves the right to offer evidence at the trial of

this case with respect to any issue of fact under the pleadings in this case which has not been resolved by the stipulation of facts hereinabove set forth, provided that:

(a) The party intending to offer such evidence shall give written notice thereof to the other parties within thirty days from the date hereof, which notice shall state the names and addresses of all witnesses such party intends to call to testify at the trial with respect to such issue of fact and a summary of the testimony of each such witness, and such notice shall be accompanied by a copy of all documents or writings which such party intends to offer in evidence at the trial with respect to such issue of fact;

(b) Within twenty days after such notice, each party receiving the same shall give notice in writing to the other parties of the names and addresses of all witnesses whom such party intends to call to testify with respect to such issue of fact, and a summary of the testimony of each such witness, and shall accompany such notice with a copy of all documents or writings which such party intends to offer in evidence at such trial with respect to such issue of fact; and

(c) Each party reserves the right to object to the materiality, relevancy or competency of such evidence, or to object to such evidence on the ground that it is not material, relevant or competent with respect to any valid legal issue in this case.

Dated this 24th day of April, 1964.

Joseph S. Jones, C. E. Henderson, Ray, Rawlins, Jones & Henderson, Attorneys for Plaintiff.

L. Tom Perry, Attorney for Defendant, The First National Bank of Logan.

William T. Thurman, United States Attorney, By .....

Walker E. Anderson, Assistant United States Attorney, Attorney for Defendant, John J. Saxon, Comptroller of the Currency.

[fol. 15]

IN UNITED STATES DISTRICT COURT

NOTICE BY THE COMPTROLLER—Filed May 22, 1964

To the parties named above and their attorneys, please take notice that with regard to the Stipulation Of Facts And Other Matters dated April 24, 1964, the Comptroller has no objection to this Stipulation, except that the Comptroller does not agree to the relevancy of the matters set out in paragraph 6, except, insofar as it goes to the $10,000.00 jurisdictional amount; and that the Comptroller may file a Motion to Dismiss, or a Motion for Summary Judgment; that paragraph 10 of the Stipulation should be amended by inserting after the word "case" in the third sentence of paragraph 10, the phrase "if this action is not adjudicated on the motion of any of the parties herein" as this amendment would negate any possible inference that by executing the Stipulation the Comptroller would not waive any rights to file such a Motion or Motions.

Dated this 22nd day of May, 1964.

William T. Thurman, United States Attorney, By Walker E. Anderson, Assistant United States Attorney, Attorney for Defendant, John J. Saxon, Comptroller of the Currency.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO JOINDER IN STIPULATION—Filed May 28, 1964

It Is Hereby Stipulated between the defendant, James J. Saxon, Comptroller of the Currency, and the plaintiff, through their respective counsel, that said defendant hereby joins in the Stipulation Of Facts And Other Matters dated April 24, 1964, made and entered into between plaintiff and the defendant, The First National Bank of

Logan, and on file herein, and plaintiff and said Comptroller hereby stipulate to the facts and other matters set forth in said Stipulation dated April 24, 1964, except that the Comptroller does not agree to the relevancy of the matters set forth in paragraph 6 of said Stipulation, except, insofar as said paragraph goes to the $10,000 jurisdictional amount; and it is further stipulated that the Comptroller may file a motion to dismiss, or a motion for summary judgment; and that paragraph 10 of said Stipu- [fol. 16] lation of Facts and Other Matters hereby is amended by inserting after the word "case" in the third sentence of paragraph 10, the phrase "if this action is not adjudicated on the motion of any of the parties herein."

Dated this 28 day of May, 1964.

William T. Thurman, United States Attorney, By Walker E. Answeron, Assistant United States Attorney, Attorney for Defendant, John J. Saxon, Comptroller of the Currency.

Ray, Rawlins, Jones & Henderson, By C. E. Henderson, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed June 19, 1964

Pursuant to the Stipulation of Facts and Other Matters heretofore filed herein, dated April 24, 1964, between plaintiff and the defendant, The First Security Bank of Logan, hereinafter sometimes referred to as the "defendant bank," the defendant bank gave written notice, as provided in paragraph 10 of said Stipulation of Facts and Other Matters, of the witnesses said defendant bank intends to call to testify at the trial of this case with respect to issues of fact under the pleadings which are not resolved by the Stipulation of Facts contained in said Stipulation of Facts and Other Matters dated April 24, 1964.

In order to obviate the calling of said witnesses at the trial, the plaintiff hereby stipulates with the defendant bank that if the witnesses hereinafter named were called by the defendant bank to testify at the trial, their testimony would be in substance as hereinafter set forth. It is further stipulated however, that said proffered testimony is and shall be subject to plaintiff's objection that the same is not admissible on the grounds that such proffered testimony is immaterial, irrelevant and incompetent with respect to any issue in this case, including any valid legal issue herein.

[fol. 17] John Wanless, Jr., if called to testify as a witness at the trial of this case, would testify in substance as follows: That he resides at 2131 Lincoln Street, Salt Lake City, Utah, and is employed as a National Bank Examiner; that in the course of his investigation of the application of the defendant bank to establish a branch bank in Logan, Utah, between November 27 to November 29, 1962, inclusive, he telephoned Reed E. Holt, President of the plaintiff, in Salt Lake City, Utah, and informed Mr. Holt of the application of the defendant bank to establish a branch bank in Logan, Utah; that in so informing Mr. Holt, he was not giving any official notice of a hearing on said application as no official notice was prescribed nor required with respect to a hearing on said application for a branch bank and no hearing on said application was had nor required by law or any governmental regulation; that Mr. Holt advised him that in Mr. Holt's opinion the establishment of such branch bank by the defendant bank would be contrary to law, as the laws of the State of Utah, which govern the Comptroller's action in such cases, prohibit the establishment of such branch by the defendant bank and that the plaintiff was about to commence an action in the state courts to enjoin the establishment of a branch bank by the State Bank of Provo, in Provo, Utah, under facts identical to the situation in Logan; that he made a report of his conversation with Mr. Holt to the Comptroller of the Currency.

G. Wesley Schaub, if called to testify as a witness at the trial of this case, would testify in substance as follows: That he resides at 576 East 5th North, Logan, Utah, and is an architect engaged in the practice of architecture at 75 North Main Street, Logan, Utah; that on or about January 17, 1963, the defendant bank engaged his firm to draw plans and specifications for the remodeling of the Ace Raymond Building in Logan, Utah, located at 444 North Main Street, Logan, Utah, into a drive-in branch bank; that at said request he made plans and specifications for the remodeling of said building and submitted them to the defendant bank for their approval; that the defendant bank did not accept the plans, but on May 6, 1963, paid him the sum of $798.00 for plans for remodeling said building; that on or about May 6, 1963, he made preliminary drawings and specifications for a new drive-in branch bank at 470 North Main, Logan, Utah, and partially completed the plans, that the defendant bank paid him the sum of $400.00 on July 8, 1963 and notified him about that time to delay the completion of said plans.

[fol. 18] Ronald S. Hansen, if called to testify as a witness at the trial in this case, would testify in substance as follows: That he resides at 974 North 15th East, Logan, Utah, and is the Assistant Vice-President of the defendant bank; that on the first day of May, 1960, the Federal Reserve Bank of San Francisco appointed the defendant bank as its agent to receive, verify, store, control, process and distribute federal reserve notes and United States currency in the event of an emergency, as shown by a copy of a letter annexed hereto by the Federal Reserve Bank of San Francisco, dated May 18, 1960, to the defendant bank; that the defendant bank accepted said appointment and the same has not been cancelled or revoked; that annexed hereto are copies of Circular No. 4, Supplement 1 thereto, and Circular No. 5, referred to in said Federal Reserve Bank Letter; that after the application of the defendant bank for authority to establish a branch bank in Logan,

Utah, the defendant bank consulted Peter W. Billings, Attorney at Law, as to its right to establish a branch bank and received a written opinion from Mr. Billings, dated November 23, 1962, a copy of which is annexed hereto; that the defendant bank also consulted their own attorney, and was informed that he agreed with the opinion of Peter W. Billings and that a branch could legally be established; that on January 17, 1963, the defendant bank received a telegram from the Comptroller of the Currency of the United States, a copy of which is annexed hereto, and on January 21, 1963, the defendant bank received a certificate of approval for the establishment of a branch bank in Logan, Utah, at 446 North Main Street of said city; that on May 1, 1963, the Comptroller advised the defendant bank that the address of the authorized place of business would be changed upon being notified two weeks prior to the date the branch will open for business at the permanent location; and between May 5th and May 10th, 1963, the defendant bank purchased land for the construction of the permanent site at a neighboring location, 470 N. Main St., for the sum of $75,896.90, but withheld construction thereon by agreement with the Comptroller pending the outcome of this litigation; that said land was purchased as a building site for said branch office, but no branch office has been built thereon; that on or about February 27, 1963, the defendant bank entered into a contract with Mosler Safe Company for the purchase of a vault door, vent, night depository, safety deposit boxes and window for said branch bank, and if said contract is cancelled, Mosler Safe Company claims the sum of $3,341.00 as a settlement for the cancellation thereof; that the defendant bank has paid as rental on the premises for branch bank the sum of [fol. 19] $1,275.00; that within a day or two after plaintiff had commenced an action on November 29, 1962, in the District Court of Salt Lake County, State of Utah, against Spencer C. Taylor, Bank Commissioner of the State of Utah, and the State Bank of Provo (Civil No. 140064),

involving the validity of the establishment of a branch bank in Provo, Utah, by the State Bank of Provo, he read a newspaper report of the filing of said action and thereupon consulted the defendant bank's attorney, L. Tom Perry, to obtain his opinion as to the significance of said action with respect to said application of the defendant bank for the establishment of a branch bank in Logan; that after two or three weeks said defendant bank's attorney gave a written opinion to said defendant bank with respect to this significance of said state action, wherein, among other things, said attorney advised as follows:

"Although a judicial interpretation of our state statute will not be binding upon us when made by a state court, if an interpretation of the state statute is made by a Utah Court in an action to prevent the Provo State Bank from establishing a branch at the B.Y.U., this decision will likely be used by the Federal Court as a measuring stick in its application of the Federal law. I, therefore, await with interest the outcome of the Walker Bank vs. State Bank Commissioner."

Donald J. Melvin, if called to testify as a witness at the trial in this case, would testify in substance as follows: That he is employed in the office of the Comptroller of the Currency, Washington, D.C.; that the application of the defendant bank to establish a branch bank in Logan, Utah, was referred to him for study and he advised the Comptroller as to the legality of granting the application.

Dated June 18, 1964.

Joseph S. Jones, C. E. Henderson, Ray, Rawlins, Jones & Henderson, Attorneys for Plaintiff.

L. Tom Perry, Attorney for Defendant, The First National Bank of Logan.

[fol. 21]

CIRCULAR No. 4
February 28, 1963 (Revised)

FEDERAL RESERVE BANK
OF SAN FRANCISCO

PREPAREDNESS PROGRAM FOR
EMERGENCY OPERATIONS IN BANKING

NOTE: This circular is not effective until a national emergency has been declared

CASH OPERATIONS DURING
A NATIONAL EMERGENCY

To the Banks, Bankers, and Trust Companies
of the Twelfth Federal Reserve District.

Dear Sirs:

This circular sets forth the plans of the Federal Reserve Bank of San Francisco for emergency cash operations in the Twelfth Federal Reserve District during a national emergency. A "national emergency" is an emergency in which the United States is involved in war or which may be proclaimed by the President of the United States to be a national war emergency and in which this Federal Reserve bank puts into effect its plan for emergency operations.

In the event an attack on the United States results in certain Federal Reserve bank offices being rendered inoperative, it may not be possible to supply the currency needs of the banking system in the normal manner. Therefore, in a national emergency, banks should do everything possible to take care of their currency requirements through other channels, and the procedure outlined in this circular should be utilized only if such other channels prove inadequate.

Currency Operations to Be Decentralized

If one or more offices of this bank is rendered inoperative it may be necessary to decentralize currency operations of inoperative offices by utilizing facilities of certain commercial banks, referred to herein as "cash agent banks".

The procedure outlined in this circular becomes effective only upon receipt of notification by, or on behalf of, the Federal Reserve Bank of San Francisco that an emergency exists, and such notice will specify whether this circular is effective as to all banks in the district or only as to the banks in the areas served by certain offices of this bank, depending upon the extent of the emergency.

If one or more offices of this bank are operative, every effort will be made for such office(s) to assume operations of the inoperative office(s), and, in such circumstances, the provisions of this circular will be applicable only to banks in those areas where it becomes necessary to activate cash agent banks.

The provisions of this bank's current coin and currency circulars shall continue in effect, except as herein modified.

Relocation Offices

If no office of this bank is operative in a national emergency, limited operations of the Federal Reserve Bank of San Francisco and its branches will be conducted at relocation offices to be activated as indicated in this bank's "Preparedness Program for Emergency Operations in Banking, Circular No. 1". *Supplies of currency will not be maintained at relocation offices.*

All Banks to Be Accommodated

During a national emergency both member and nonmember banks may make use of the currency services provided for in this circular.

[fol. 21a]

DESIGNATION OF CASH AGENT BANKS

The Federal Reserve Bank of San Francisco has designated certain cities for decentralization of currency operations within the Twelfth District, and certain commercial banks or their branches in these localities have agreed to be cash agents of the Federal Reserve Bank of San Francisco and to act on its behalf.

These cash agent banks are listed in Supplement 1 to this circular together with the area which each cash agent bank will serve if called upon during a national emergency. The instructions applicable to such cash agent banks are outlined in Preparedness Program Circular No. 5.

ALTERNATE CASH AGENTS

If an attack on the United States renders certain cash agent banks inoperative, this bank will, as soon as possible, either arrange for operative cash agent banks to service the emergency cash areas concerned or enter into agreements with alternate cash agents. This bank will endeavor to notify all concerned promptly of any changes in cash agent banks.

EXTENT OF SERVICE BY CASH AGENT BANKS

Cash agent banks will accept deposits of currency from member banks for credit to their reserve accounts and from nonmember clearing banks for credit to their nonmember clearing accounts. A nonmember bank which does not maintain an account with an office of this bank should designate a member bank whose account is to be credited for currency deposits.

Cash agent banks will make shipments of currency to member and nonmember banks in accordance with the provisions of existing circulars governing shipments by this bank, except as they may be modified hereby.

Every effort will be made by cash agent banks to supply banks with currency in such amounts, denominations, and degree of fitness as may be possible under the prevailing conditions. Because of shortages in the currency supply or because of transportation difficulties, it may be necessary for cash agent banks to institute a rationing program, to defer shipments, or to substitute other denominations of currency for those specified in the order of the requisitioning bank. No provision is made for cash agent banks to supply coin.

Shipments From Cash Agent Banks

In a national emergency, specimen signatures of those authorized to act on behalf of each bank in an emergency cash area should be furnished promptly to the cash agent bank for that area. Banks should request shipments of currency from cash agent banks only in cases of actual need. Requests directed to the cash agent banks should be made by mail, telegraph with approved A.B.C. testword, or such other means of communication as may be available. In exceptional circumstances, shipments will be made by cash agent banks on telephonic requests if the need is urgent and the authenticity of the requests can be established. In such instances, confirmation bearing authorized signature(s) should be forwarded to the cash agent bank immediately.

A member bank or a nonmember clearing bank should authorize a charge to its account for the amount of the shipment. A bank which does not maintain an account with this bank may make payment by a member bank draft drawn on this bank or by arranging with a member bank to authorize a charge to its account for the shipment.

Currency received from cash agent banks should be verified and acknowledged immediately upon receipt. Any discrepancies in shipments received should be immediately reported to the cash agent bank supported by the strap

of the discrepant package to enable the cash agent bank to effect an appropriate adjustment.

Cash agent banks will, at the expense of this bank, make currency shipments to participating banks by registered mail, express, armored car, or by such other means of [fol. 21b] transportation as may be deemed by the cash agent bank to be reasonably safe and proper in view of the circumstances.

SHIPMENTS TO CASH AGENT BANKS

Banks should forward surplus stocks of currency to cash agent banks for credit to the forwarding bank's account with this bank or for credit to the account of the forwarding bank with a correspondent member bank. When making deposits of currency with cash agent banks, member banks should continue to follow the instructions outlined in this bank's Circular 14 insofar as the same may be applicable and should forward a separate mail advice of shipment to the cash agent bank. Similarly, nonmember banks should make such deposits in accordance with the provisions of this bank's circular letter on "Coin and Currency" addressed to such banks.

Any bank shipping currency to any cash agent bank for the account of this bank shall by such action be deemed to have agreed that all such shipments shall be prepared and verified by one or more responsible employees of the sender and that the sealed package shall be in charge of a responsible person until deposited and registered at the post office, or delivered for shipment by means of transportation selected or approved by this bank or a cash agent bank and that the contents of all packages shall be enclosed in a strong wrapper, envelope, or cloth or canvas bag, well secured, and sealed in a manner acceptable to the post office, or the other approved means of transportation at the place of mailing or dispatch.

Banks should make shipments of surplus currency to cash agent banks by registered mail, express, armored car, or by such other means of transportation as may be approved by this bank or the cash agent bank. When forwarding shipments of currency during an emergency, banks should recognize that greater risks, not only of destruction but also of theft, may be involved than under normal circumstances, and every effort should be made to insure that maximum protective measures are taken. Reimbursement of shipping costs will be made by this bank.

Banks in the same geographical area are urged to exchange currency with other banks whenever possible to avoid unnecessary shipments.

ASSUMPTION OF RISK

During a national emergency, notwithstanding the assumption of risk provisions of this bank's Circular 14 addressed to member banks and its circular letter addressed to nonmember banks on the same subject, any bank (member or nonmember) shipping or causing or ordering shipments of currency to, from, or for the account of this bank or any cash agent bank shall by such action be deemed to have agreed to the following terms and conditions with respect to such shipments:

> Subject to the terms of this circular, this bank will assume all risks incident to the transportation of such shipments of currency (a) by registered mail, and (b) by such other means of transportation as may be selected or approved by this bank or its cash agent bank, from the time such shipments leave the office of the sending bank until delivered at the office of the addressee bank, as enumerated below.
>
> Such risks hereby assumed shall include, but not be limited to, any loss resulting from hostile or warlike action by any military, naval, air forces, or agents of domestic, foreign or revolutionary governments,

powers, or forces, whether or not war has been formally declared and including defending against an actual or expected attack; or any loss caused by any weapon of war employing atomic fission or radioactive force.

This bank, however, will not assume any risk (other than the war and nuclear reaction risks described in the preceding paragraph) for shipments sent by Railway Express Agency, Inc., while such shipments are in the custody of the Railway Express Agency, Inc., as the rate charged by the express company on such shipments is based on the declared value and the ordinary risks of loss are assumed by the express company under its shipping contract.

[fol. 21c] EXCEPTIONS

This bank will not assume any risks of loss in any of the following circumstances, and any loss thereunder is agreed and understood to be assumed by the bank shipping or causing or ordering such shipments:

(1) Any loss in excess of $2,000,000 on all shipments by any one banking office to this bank and to its cash agent banks on any one day.

(2) Any loss resulting from any dishonest, fraudulent, or criminal act of any employee of any bank, other than this bank or its cash agent banks, shipping, causing, ordering, or receiving the shipment.

(3) Any loss to the extent recoverable from any insurance, surety or indemnity company pursuant to purchased insurance, surety or indemnity (including bankers' blanket bond), whether primary or excess, carried by or maintained by any person other than this bank or its cash agent banks.

(4) Any loss on any shipment by any bank, other than a Federal Reserve bank or a cash agent bank, not made in conformity with the provisions of this circular.

Emergency Terms and Conditions

Banks forwarding currency to or requisitioning currency from a cash agent bank, will by such act be understood to have agreed to the terms and conditions of this circular and to any applicable regulations of the Board of Governors of the Federal Reserve System, and as they may be amended.

Disposition of Money in Possession of Armored Car Carrier During an Attack

This bank's plan for distribution of money in a national war emergency provides for disposition of money en route to, from, or for the account of this bank by armored car during an attack. It is provided that, if disposition is not feasible under certain other described circumstances, then the money shall be delivered by the armored car representative to the most accessible and operable commercial bank to be held in custody by such bank as agent for this bank, pending further instructions from this bank, its "Cash Agent bank", another Federal Reserve bank, or the Board of Governors of the Federal Reserve System. Commercial banks in the Twelfth Federal Reserve District are authorized so to act as this bank's agent under the above circumstances. This bank will reimburse such bank for all expenses properly incurred by it as such agent and will indemnify it against all hazards except loss due to the agent's failure to maintain its customary security measures in the protection of the money insofar as possible under the conditions then existing.

This bank hereby agrees with the armored carrier of shipments of currency or coin, which during an attack are in transit by armored car to, from, or for the account of this bank, that the armored carrier will be deemed to have completely discharged and satisfied all of its responsibility for the safe handling and delivery of such shipments by delivery thereof to and acceptance thereof by the first operable and

accessible receiving commercial bank to which such delivery is tendered and accepted in the following order:

1. The original consignee bank;
2. An operable and accessible branch of the original commercial bank consignee;
3. Any other commercial bank as instructed by this bank;
4. This bank's closest operable and accessible cash agent bank;
5. The most accessible and operable commercial bank.

The right is reserved to withdraw, add to, or amend at any time, any of the provisions of this circular.

Yours very truly,

FEDERAL RESERVE BANK OF
SAN FRANCISCO

By /s/ ELIOT J. SWAN
President.

NOTE: This supplement is not effective until a national emergency has been declared.

DESIGNATED CASH AGENT BANKS AND AREAS TO BE SERVED

HEAD OFFICE ZONE

Emergency Cash Area	Name and Location of Cash Agent Bank	Counties to be Served
SF 1	Fresno Office Crocker-Anglo National Bank Fresno, California	California Fresno, Kings, Madera, Mariposa, Merced, Tulare
SF 2	Redding Office Crocker-Anglo National Bank Redding, California	California Alpine, Butte, Glenn, Lassen, Modoc, Plumas, Shasta, Siskiyou, Tehama, Trinity
SF 3	Santa Rosa Office The Bank of California, N.A. Santa Rosa, California	California Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Sonoma
SF 4	Stockton Main Office Wells Fargo Bank American Trust Company Stockton, California	California Alameda, Amador, Calaveras, Colusa, Contra Costa, El Dorado, Nevada, Placer, Sacramento, San Joaquin, Sierra, Solano, Stanislaus, Sutter, Tuolumne, Yolo, Yuba
SF 5	Head Office Nevada Bank of Commerce Reno, Nevada	Nevada Churchill, Douglas, Esmeralda, Eureka, Humboldt, Lander, Lyon, Mineral, Nye, Ormsby, Pershing, Storey, Washoe

LOS ANGELES BRANCH ZONE

LA 1	Flagstaff Office First National Bank of Arizona, Phoenix Flagstaff, Arizona	Arizona Apache, Coconino, Mojave, Navajo, Nevada Clark
LA 2	Home Office The Valley National Bank of Phoenix Phoenix, Arizona	Arizona Gila, Maricopa, Pinal, Yavapai, Yuma
LA 3	Bakersfield Main Office Bank of America N.T. & S.A. Bakersfield, California	California Inyo, Kern, Los Angeles, Mono, Orange
LA 4	El Centro Branch Bank of America N.T. & S.A. El Centro, California	California Imperial, Riverside, San Bernardino, San Diego
LA 5	Santa Barbara Main Office Crocker-Anglo National Bank Santa Barbara, California	California San Luis Obispo, Santa Barbara, Ventura

PORTLAND BRANCH ZONE

Emergency Cash Area	Name and Location of Cash Agent Bank	Counties to be Served
PO 1	Coeur d'Alene Office The Idaho First National Bank Coeur d'Alene, Idaho	Idaho Benewah, Bonner, Boundary, Clearwater, Idaho, Kootenai, Latah, Lewis, Nez Perce, Shoshone
PO 2	Baker Branch The United States National Bank of Portland Baker, Oregon	Oregon Baker, Grant, Malheur
PO 3	Bend Branch The First National Bank of Oregon, Portland Bend, Oregon	Oregon Crook, Deschutes, Harney, Jefferson
PO 4	Coos Bay Branch The First National Bank of Oregon, Portland Coos Bay, Oregon	Oregon Coos, Douglas
PO 5	Eugene Main Branch The First National Bank of Oregon, Portland Eugene, Oregon	Oregon Benton, Lane
PO 6	Medford Branch The First National Bank of Oregon, Portland Medford, Oregon	Oregon Curry, Jackson, Josephine, Klamath, Lake
PO 7	Pendleton Branch The United States National Bank of Portland Pendleton, Oregon	Oregon Gilliam, Hood River, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco, Wheeler
PO 8	Ladd & Bush—Salem Branch The United States National Bank of Portland Salem, Oregon	Oregon Clackamas, Clatsop, Columbia, Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, Yamhill
PO 9	Longview Branch Seattle-First National Bank Longview, Washington	Washington Clark, Cowlitz, Klickitat, Pacific (Ilwaco), Skamania, Wahkiakum
PO 10	Head Office The Baker-Boyer National Bank of Walla Walla Walla Walla, Washington	Washington Asotin, Columbia, Garfield, Walla Walla

[fol. 23a]

SALT LAKE CITY BRANCH ZONE

Emergency Cash Area	Name and Location of Cash Agent Bank	Counties to be Served
SL 1	Head Office First Security Bank of Idaho, N.A. Boise, Idaho	Idaho Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley, Washington
SL 2	Pocatello Office First Security Bank of Idaho, N.A. Pocatello, Idaho	Idaho Bannock, Bear Lake, Bingham, Bonneville, Butte, Caribou, Clark, Custer, Franklin, Fremont, Jefferson, Lemhi, Madison, Oneida, Power, Teton
SL 3	Head Office Twin Falls Bank & Trust Company Twin Falls, Idaho	Idaho Blaine, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka, Twin Falls
SL 4	Elko Branch Nevada Bank of Commerce Elko, Nevada	Nevada Elko, Lincoln, White Pine
SL 5	The First National Bank of Logan Logan, Utah	Utah Box Elder, Cache, Davis, Morgan, Rich, Weber
SL 6	Farmers & Merchants Branch Walker Bank & Trust Company Provo, Utah	Utah Beaver, Carbon, Daggett, Duchesne, Grand, Iron, Juab, Millard, Salt Lake, San Juan, Summit, Tooele, Uintah, Utah, Wasatch, Washington
SL 7	First State Bank of Salina Salina, Utah	Utah Emery, Garfield, Kane, Piute, Sanpete, Sevier, Wayne

[fol. 23b]

SEATTLE BRANCH ZONE

SE 1	Bellingham Branch Seattle-First National Bank Bellingham, Washington	Washington Island, San Juan, Skagit, Snohomish, Whatcom
SE 2	Olympia Branch The National Bank of Commerce of Seattle Olympia, Washington	Washington Clallam, Grays Harbor, Jefferson, King, Kitsap, Lewis, Mason, Pacific, Pierce, Thurston
SE 3	Columbia Valley Branch The National Bank of Commerce of Seattle Wenatchee, Washington	Washington Adams, Chelan, Douglas, Ferry, Grant, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Whitman
SE 4	Yakima Valley Branch Seattle-First National Bank Yakima, Washington	Washington Benton, Franklin, Kittitas, Yakima

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER OF DEFENDANT FIRST NATIONAL BANK OF LOGAN—Filed July 6, 1964

Comes now the Defendant, The First National Bank of Logan, and having obtained the consent of the Plaintiff in writing pursuant to Rule 15 (a) amends its answer as follows:

1. The Sixth Defense as stated in said answer is amended to read as follows:

Sixth Defense

That portion of Section 7-3-6, Utah Code Annotated, 1953, which grants certain branch banking privileges to banks in other cities is contrary to the provisions of Amendments V and XIV of the Constitution of the United States, Sections 2 and 7 of Article I and Section 26 of Article VI of the Constitution of the State of Utah.

2. A Seventh Defense is added to said answer which reads as follows:

Seventh Defense

Under the interpretation of the Utah Supreme Court in Walker Bank & Trust Company v. Taylor, —— Utah ——, 390 P2d 592, dated after the filing of defendant's answer, the first sentence of the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953 which provides:

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business unless the bank

seeking to establish such branch shall take over an existing bank.

is invalid, unconstitutional and contrary to the provisions of Amendments V and XIV of the Constitution of the United States, Sections 2 and 7 of Article I, and Section 26 of Article VI of the Constitution of the State of Utah.

Dated this 6th day of July, 1964.

L. Tom Perry, Attorney for the Defendant First National Bank of Logan.

[fol. 26]

IN UNITED STATES DISTRICT COURT

STIPULATION RE SUBMISSION AND FILING OF BRIEFS—Filed July 9, 1964

It is hereby stipulated by the parties in the above entitled action through their respective counsel, as follows:

The case is hereby submitted to the court for its decision on the merits upon the facts stipulated to by the parties and set forth in the Stipulation of Facts and Other Matters, dated April 24, 1964 and filed herein, and the Stipulation between plaintiff and the defendant, The First National Bank of Logan, dated June 18, 1964, and filed herein, with respect to said defendant's proffered testimony of certain witnesses as set forth in said stipulation, which is subject, however, to plaintiff's objection that the same is not admissible on the grounds that it is immaterial, irrelevant and incompetent with respect to any issue in this case, including any valid legal issue herein.

Within 15 days from the date hereof, counsel for the respective parties will exchange memoranda of points and authorities and counsel may, within 30 day from the date hereof, exchange reply memoranda, and if the court de-

sires, counsel will present oral arguments at a hearing therefor set by the court.

Dated this 30 day of June, 1964.

Joseph S. Jones, C. E. Henderson, Ray, Rawlins, Jones & Henderson, Attorneys for Plaintiff;

L. Tom Perry, Attorney for Defendant, The First National Bank of Logan;

William T. Thurman, United States Attorney, By Walker E. Anderson, Assistant United States Attorney, attorney for defendant, John J. Saxon, Comptroller of the Currency.

Approved—

To be set for oral argument on final submission for first Rule Day in Ogden in Sept. 1964 ASC 7-9-64

[fol. 27]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY SEPTEMBER 15, 1964—
DENYING MOTIONS TO DISMISS

This matter regularly came before the court, Northern Division, Ogden, Utah, at 10:00 a.m. for oral argument on final submission.

C. E. Henderson, Esquire, Joseph S. Jones, Esquire, and James Freed, Esquire, appeared for the plaintiff. L. Tom Perry, Esquire, and Theodore S. Perry, Esquire, appeared for the First National Bank of Logan; Walker E. Anderson, Esquire, Assistant United States Attorney, appeared for James J. Saxon, Comptroller of the Currency.

Motion of counsel for the First National Bank of Logan to dismiss was denied. Motion of counsel for the Comptroller for reconsideration of the motion to dismiss was also denied.

Arguments of counsel were heard.

The court took the matter under advisement.

In United States District Court

Memorandum Decision—September 30, 1964

This is a declaratory judgment proceeding to test the power of the Comptroller of the Currency to authorize the establishment by a national banking association of a branch bank in a city in which it is situated, where conditions under which State banks are expressly authorized to establish new branches cannot now be met for practical reasons. This question, involving a construction of Section 36 (c)(1) of the National Banking Act, appears to be of novel impression. The published decisions of the Federal courts involve primarily subdivision (2) of the same subsection.[1]

[fol. 28] On or about November 9, 1962, the defendant, The First National Bank of Logan, applied to the Comptroller of the Currency for authority to establish a branch bank in the City of Logan, Utah, which is a city of the second class. The defendant bank did not take over an existing bank and, indeed, could not because it was the only bank, other than branches, situated in Logan.

Prior to the Comptroller's authorization for the establishment of a branch by the defendant bank, it had no branch. The plaintiff, Walker Bank & Trust Company, was regu-

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[1] 12 U.S.C. §36(c)

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the same time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . ."

larly conducting a customary banking business in Logan through its branch, which it had acquired by statutory merger of Cache Valley Banking Company, a State bank theretofore operating as a unit bank in that city. First Security Bank of Utah, N.A., not a party to this proceeding, also had a branch in Logan. On January 21, 1963, the Comptroller issued his certificate authorizing the defendant to establish and operate a branch in Logan and on that date the latter commenced regularly to transact customary banking business at this branch. Unless precluded from so doing by judgment of this court, it is clear that the defendant bank will continue to operate this branch.

As will be seen from the text in the margin, within the limits of the city, town or village in which a national association is situated, the Comptroller of the Treasury by virtue of subsection (1) of Section 36(c) may authorize the establishment of branches by a national banking association expressly authorized at the time to State banks by State law. With respect to points outside of such municipalities in which the association in question may be situated, subdivision (2) of subsection (c) authorizes the establishment of branches by the national banking association if at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or [fol. 29] recognition, and subject to the restrictions as to location imposed by State law on State banks. The laws of the State of Utah authorize the establishment by a State bank of a branch only if it takes over another existing branch.[2] It has been authoritatively determined that where,

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[2] Section 7-3-6 Utah Code Annotated, 1953, insofar as material, provides:

"... With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

(continued on following page)

as in Logan, there is only one unit bank, as distinguished from branches, that bank, if it were a State bank, could not establish a branch because there would be no other bank for it to acquire to satisfy the condition imposed by State law.[3] [fol. 30] The defendant Bank argues that by reason of the incorporation of State law in Section 36(c) of the National Banking Act the Comptroller must follow the State law and its construction by the State Supreme Court in acting upon applications for branches of national banks;[4] that the Utah law prohibits the establishment of a branch bank by

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"All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank . . ."

(As amended by Laws of Utah 1957, and 1963. The later amendment, following the authorization here in question, eliminated the necessity of approval of the State branch by the Governor.)

[3] See Walker Bank & Trust Company v. Taylor, 15 $Utah_2$ 234, 390 P_2 592 (1964), in which it is said, p. 595: "It necessarily follows that State Bank of Provo cannot establish a branch within that city because there is no other existing unit bank [although there were branches of two outside banks as in Logan] which it could take over. Possibly, this might seem unreasonable but it cannot be deemed absurd . . ."

[4] Citing National Bank of Detroit v. Wayne Oakland Bank, 6th Cir., 252 F_2 537 (1958), cert. den. 358 U.S. 830 (1958); Commercial State Bank of Roseville v. Gidney, D.C.D.C., 174 F. Supp. 770 (1959), aff'd, per curiam, 278 F_2 871 (1960); Suburban Trust Company v. National Bank of Westfield, D.C.D.N.J. 211 F. Supp. 694 (1962), and 222 F. Supp. 269 (1963); State of South Dakota v. National Bank of South Dakota, D.C.S.D.S.D., 219 F. Supp. 842 (1963).

any other bank under the existing conditions,[5] and that the establishment and operation of a new branch, therefore, are not "at the time expressly authorized to State banks by the law of the State in question."[6] The defendants maintain [fol. 31] that under the laws of the State of Utah a State bank can establish a branch within the city of its main office by acquiring an existing bank and thus State banks are authorized to have branches in such city within the contemplation of 36(c)(1), and that, accordingly, national banking associations may be authorized by the Comptroller to have branches in such cities in which they are situated upon such conditions as may be provided by the Federal law and the regulations of the Comptroller. The Comptroller further contends that even with respect to a national banking association seeking to establish a branch outside of city, town or village in which it is situated, the only condition of State law with which there would have to be compliance under 36(c)(2) would be with respect to "location."[7]

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[5] Walker Bank & Trust Company v. Taylor, 15 $Utah_2$ 234, 390 P_2 592, supra.

[6] The plaintiff on the latter point quotes from National Bank of Detroit v. Wayne Oakland Bank, 252 F_2 537, 540, supra: "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank"; from Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770, 774, supra: "Congress has adopted state law on the establishment of branches by state banks as the measuring stick for the establishment of branches by national banks"; and from State of South Dakota v. National Bank of South Dakota, S.D.S.D., 219 F. Supp. 842, at 846, supra, that: "state law is adopted by the federal government and made the measuring stick by which it is determined whether national banks may establish branches."

[7] It is unnecessary to pass upon the last mentioned contention except as it may throw light upon the proper interpretation of subdivision (1) of subsection (c).

It is my opinion that under the laws of the State of Utah as declared by Section 7-3-6, Utah Code Annotated, 1953, and interpreted by Walker Bank & Trust Company v. Taylor, 390 P_2, 592, supra, the establishment and operation of new branches within the limits of the city, town or village in which a State bank is situated, are "expressly authorized" to State banks within the contemplation of Section 36(c)(1), Title 12 U.S.C., and that therefore the Comptroller had power to authorize the establishment of a branch by the defendant National Banking Association in the City of Logan. My reasons are these:

It is an undeniable fact that there is "express authority" under the laws of the State of Utah for State banks to establish branches in the City of Logan.[8] The plain meaning of [fol. 32] subdivision (1) of 12 U.S.C. 36(c), and the contrasting provisions of subdivision (2), applicable to other situations, reinforce this construction.[9] There is a presumption that Congress did not intend the provisions of subdivision (1) to be superfluous or to make the provisions of subdivision (2) applicable to the situation covered by sub-

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[8] The first sentence quoted from the State statute in footnote 2 is general express authority for the establishment of branches by State banks. That there are conditions for such establishment, including the consent of the bank commissioner, capitalization requirements and, in certain cities and under specified conditions, the acquisition of another bank, does not change the "express authority" into a lack of authority on the part of State banks or a lack of a statutory expression of such authority, and does not add to the Federal statute a requirement that compliance be made by National banks with all State conditions.

[9] Subdivision (1) refers only to the condition "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;" while subdivision (2) adds, among other things, the additional qualification that such establishment of branches by national banking associations shall be "subject to the restrictions as to location imposed by the law of the State on State banks . . ."

division (1).[10] The legislative history of the 1927 amendment incorporating subdivision (1) in the National Banking Act, in contrast to the legislative history of the new provision incorporated by the 1933 amendment and now set out in subdivision (2) is persuasive that Congress did not intend to apply the same conditions.[11] The decisions relied

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[10] "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2 Sutherland Statutory Construction, 3rd, §4705, p. 339 (1943).

[11] Prior to approval of the Act of Feb. 25, 1927, the Comptroller of the Currency had issued a number of permits to national banks authorizing the establishment by them of additional offices in the same city in which the banks were located. These permits were issued under authority of the National Bank Act as construed by the Attorney General in opinions rendered May 1, 1911, and October 2, 1923, respectively. No permit was issued to any national bank located in a State "where State banks were not permitted to operate branches." Instructions for the Comptroller of the Currency, at p. 518 (1928) [Doc. No. FR 1-12:914-927].

In Senate Report No. 473, 69th Cong., 1st Sess. [Serial Set. 8524], p. 8 concerning the proposed amendment to the National Bank Act upon which subdivision (1) later was based (Act of Feb. 25, 1927), it is stated: "Your Committee is in agreement with the fundamental branch banking policy of the House bill by which branch banking in the future would, in the Federal Reserve system be restricted to the confines or the limits of the city in which the parent bank is situated." When Congressman McFadden submitted H.R. 2, which ultimately became the predecessor of 12 U.S.C. §36(c)(1), to the whole House, he stated that the branch banking policy of the Bill was to: "* * * confine all branch banking within the national banking system to city limits and to prohibit national banks from establishing any branches in States which prohibit State banks from exercising this power. H.R. Rep. No. 83, 69th Cong., 1st Sess. 4 (1926)." And in its report to the Senate the Senate Committee on Banking and Currency stated that: "Under the House bill national banks would be permitted to keep the branches they now have, branch banking would be permitted for national banks in cities * * * where State banks can have branches, and national banks would be denied the right to have branches at all in any State which denied to State banks the right to have branches. * * *". S. Rept. 473, 69th Cong., 1st Sess. 10.

(continued on following page)

[fol. 33] upon by plaintiff (see footnote 4) to emphasize the controlling effect of the conditions specified by State law are constructions of subdivision (2) and no decision involv-[fol. 34] ing an interpretation of subdivision (1) has been cited. The limiting construction urged by plaintiff does not appear in harmony with the essential character of the national banking system and its supervision by the Comptroller of the Currency, as in principle it would subject national banks to State regulation where Congress has not so provided.[12] The administrative interpretation of the Act by the Comptroller since 1927 has uniformly supported the position sought to be sustained by defendant, and his ruling as evidenced by the certificate in question also is entitled to weight, even though not binding upon the court.[13]

This limitation was applicable until by the Act of June 16, 1933, Congress added subdivision (2) to Section 36(c) providing for branching by national banks outside of villages, towns and cities where they were situated. As might be expected in such a departure from the long existing federal policy of limiting branches of national banks to the cities where the parent banks were situated, a previous fundamental policy, the branches located outside such cities had to comply with additional conditions, particularly with any State limitations as to location. It seems to me that the legislative history of the 1933 amendment makes clear the distinction between the requirements of the two subsections.

[12] See Rushton v. Michigan Nat. Bank, 298 Mich. 417, 299 N.W. 129, 134 (1941); cf. State of South Dakota v. National Bank of South Dakota, D.C.S.D., 219 F. Supp. 842 (1963), supra. National banks exist wholly by virtue of Federal law. Davis v. Elmira Sav. Bank, 161 U.S. 275, 16 S. Ct. 502, 40 L. Ed. 700 (1896). "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit." Van Reed v. People's Nat. Bank, 198 U.S. 554, 25 S. Ct. 775, 776, 49 L. Ed. 1161 (1905). See also Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed.$_2$ 523 (1963).

[13] Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

The legislative history of branch banking in the State of Utah demonstrates the distinction between the prohibition or non-expression of policy as to branch banking, on the one hand, and the granting of express authority for branch banking, conditionally or unconditionally, on the other.[14] While it is unnecessary at this time to pass upon the [fol. 35] broader argument of the Comptroller that even under subdivision (2) State statutory conditions as to "location" are the only ones applicable to the establishment of branches of national banks, it seems rather apparent that subdivision (1), containing no such limitation, should not be interpreted even more restrictively.

Finally, it would be especially incongruous in view of all of these considerations, to hold that while the plaintiff State bank, heretofore expressly authorized under subsisting State law, continues to carry on branch banking in Logan City, a national bank situated in the same city could not be authorized by the Comptroller to conduct a branch banking business there.

In view of the foregoing ruling it is not necessary to pass upon the contentions of the defendant bank that as a mere competitor the plaintiff has no standing to bring this suit; that under the particular circumstances of this case plaintiff is estopped from questioning the maintenance of defendant's branch in Logan, and that the State statute as restrictively

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[14] Thus, in Walker Bank & Trust Company v. Taylor, 390 P_2 592, at 594, supra, the Utah Supreme Court among other things said: ". . . The legislative history of branch banking is of great significance. In 1911, the legislature enacted a statute which absolutely prohibited branch banking. It was not until 1933 that the legislature relaxed this prohibition and permitted branching under certain conditions and circumstances. During the period between 1911 and 1933 the legislature evidently was of the opinion that branch banking was not in the public interest, possibly because it might impair the stability of the existing banks. This reasoning could well have influenced the lawmakers when they saw fit to allow branch banking, but only under certain restrictive conditions. This legislative history lends support to the proposition that what our branch banking laws do not permit they prohibit."

interpreted in Walker Bank & Trust Company v. Taylor, 390 P_2, 592, supra, violates the Constitutions of the United States and the State of Utah. And of course it is not the province of the court to review the exercise of the Comptroller's discretion acting, as he did, within his statutory powers.

A form of declaratory judgment in harmony with the views herein expressed adjudging that the Comptroller acted within his authority in authorizing the establishment and operation of the branch in question and dismissing plaintiff's complaint, with costs to the defendants, may be served and submitted by counsel for the defendants.

Dated this 30th day of September, 1964.

A. Sherman Christensen, United States District Judge.

[fol. 36]

IN UNITED STATES DISTRICT COURT

WALKER BANK & TRUST COMPANY,

VS.

SAXON ET AL.

JUDGMENT—October 9, 1964

The above-entitled case came on regularly before the Court on September 15, 1964 for hearing oral arguments on final submission. Joseph S. Jones, Esq., C. E. Henderson, Esq., and James Freed, Esq., were present representing the plaintiff; Walker E. Anderson, Assistant United States Attorney for the District of Utah was present representing defendant, James J. Saxon, Comptroller of the Currency; L. Tom Perry, Esq., and Theodore S. Perry, Esq., were present representing defendant, The First National Bank of Logan. Based upon the pleadings and stipulations on

file and after oral arguments the case was submitted to the Court and the Court took the matter under advisement. On September 30, 1964, the Court entered and filed with the Clerk a Memorandum Decision. For the reasons stated in the Memorandum Decision it is therefore,

Ordered, Adjudged And Decreed:

1. That James J. Saxon, Comptroller of the Currency, acted within his authority in authorizing the establishment and operation of a branch bank in the City of Logan, Utah, by The First National Bank of Logan, of Logan, Utah, A National Banking Association.

2. That plaintiff's Complaint and action are hereby dismissed.

Dated, October 9th, 1964.

By the Court, A. Sherman Christensen, Judge.

Entered Oct. 19, 1964.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 4, 1964

Notice is hereby given that Walker Bank & Trust Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on October 19, 1964.

Dated: November 4, 1964.

Joseph S. Jones, C. E. Henderson of Ray, Rawlins, Jones & Henderson, Attorneys for Appellant, Walker Bank & Trust Company.

[fol. 37] [A bond on appeal in the sum of $250.00 was filed on the 4th day of November, 1964.]

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS—Filed November 5, 1964

The points upon which plaintiff-appellant will rely on appeal are:

1. The court erred in entering judgment in the above-entitled cause wherein it is ordered, adjudged and decreed that defendant-appellee James J. Saxon, Comptroller of the Currency, acted within his authority in authorizing the establishment and operation of a branch bank in the City of Logan, Utah, by the defendent-appellee. The First National Bank of Logan, of Logan, Utah, a national banking association.

2. The court erred in entering judgment dismissing plaintiff-appellant's complaint and action and in not entering a declaratory judgment and granting injunctive relief as prayed for in the complaint of plaintiff-appellant.

Dated November 5, 1964.

Joseph S. Jones, C. E. Henderson of Ray, Rawlins, Jones & Henderson, Attorneys for Appellant, Walker Bank & Trust Company.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 38a] Caption (omitted in printing).

[fol. 39]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
August 17, 1965

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard and was argued by counsel, Joseph S. Jones, Esquire, appearing for appellant, David L. Rose, Esquire, and Ted S. Perry, Esquire, appearing for appellees.

Thereupon this cause was submitted to the court.

[fol. 40]

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September Term, 1965

Number 7981

WALKER BANK & TRUST COMPANY, a corporation, Appellant,

vs.

JAMES J. SAXON, Comptroller of the Currency; and THE FIRST NATIONAL BANK OF LOGAN, of Logan, Utah, a National banking association, Appellees.

OPINION—October 26, 1965

Appeal from the United States District Court for the District of Utah, Central Division.

Joseph S. Jones (C. E. Henderson and Ray, Rawlins, Jones & Henderson on the brief) for Appellant;

[File endorsement omitted]

David L. Rose, Attorney, Dept. of Justice, (John W. Douglas, Ass't. Attorney General, William T. Thurman, U. S. Attorney and Kathryn H. Baldwin, Attorney, Dept. of Justice on the brief) for Appellee James J. Saxon, Comptroller of the Currency.

Ted S. Perry of Perry & Perry for Appellee, The First National Bank;

Brief filed by James F. Bell for Amicus Curiae.[1]

Before Phillips, Pickett and Hill, United States Circuit Judges.

HILL, Circuit Judge.

[fol. 41] Appellant, Walker Bank and Trust Company, brought this action in the court below against appellees, the Comptroller of the Currency and The First National Bank of Logan, to obtain a declaratory judgment decreeing the action of the Comptroller, in authorizing The First National Bank of Logan to establish and operate a branch bank in Logan, to be void and of no legal effect.

Both defendants, by separate answers, alleged the validity of the questioned action of the Comptroller and the defendant bank, in addition, raised the affirmative defenses of (1) lack of standing to sue on the part of the plaintiff, (2) estoppel, and (3) that the Utah statute governing the establishment of branch banks is unconstitutional. The trial court, by memorandum opinion, held that the action of the Comptroller was valid and therefore found it unnecessary to pass on any of the affirmative defenses raised. Appellant appealed from that decision.

The facts pertinent to this appeal may be briefly stated. Appellant is a banking corporation organized under the laws of Utah, with its main bank located in Salt Lake City and with a branch bank located in Logan. Appellee, The First National Bank of Logan, is a banking corporation

[1] Leave was granted to the National Association of Supervisors of State Banks to file a brief in the case as amicus curiae.

organized under the National Banking Act maintaining its principal bank in Logan, a city of the second class. [fol. 42] On January 21, 1963, the appellee, Comptroller of the Currency, after application, issued a certificate to The First National Bank of Logan, authorizing it to establish and maintain a new and separate branch bank in Logan in addition to its main bank. Our sole question pertains to the authority of the Comptroller to issue such certificate.

We must first look to the Federal and State statutes pertinent to our question. The beginning point is 12 U.S.C. § 36(c), as amended, part of which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; * * *."

(c)(2) of § 36 is set forth below[2] and covers specifically so-called "outside branches", that is branches outside the city of the parent bank. Since our facts disclose that we are [fol. 43] only concerned with (c)(1) or "inside branches", that is a branch bank located within the same city or town as the parent, we need not pass on (c)(2). Consideration of it in this case will be confined primarily to whatever light it might shed on (c)(1).

The Utah Code Ann., Title 7, Chap. 3, § 6 (1953 as amended) provides as follows:

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[2] 12 U.S.C. § 36(c)(2) provides in pertinent part:

"A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The parties stipulated that Logan, Utah, is not a city of the first class. Therefore, it is perfectly clear that in Logan, a state bank could not establish a branch bank unless it took over an existing bank which had been in operation for five previous years. The Supreme Court of Utah in Walker Bank & Trust Co. v. Taylor, 15 Utah 2d 234, 390 P.2d 592 (1964) in construing this Utah statute in regard to Provo, Utah, which like Logan is a city of the second class, held [fol. 44] that the only way a branch state bank could be established in a city of less than the first class having an existing unit bank is by taking over such existing bank. The obvious question then to decide is this: Does 12 U.S.C. § 36(c)(1) require the Comptroller to withhold his certificate of approval for the establishment of a national bank branch unless the branch is authorized in all respects by the law of the State in which the bank is located? The court below answered this question in the negative resting its opinion on the premise that § 36(c)(1) embodies only the requirement that inside branching be "expressly authorized" to State banks by State law without other conditions or restrictions of State law. In other words, even though a state bank in an identical situation with that presented here could not establish a branch bank, nevertheless a national bank could because state law generally sanctions

branch banking. For the reasons hereinafter stated, we disagree with the trial court and hold that 12 U.S.C. § 36(c)(1) provides, as Congress intended it should, that the measuring stick of national branch banks is state law.

The history of national bank legislation spans over one hundred years. The present Act was derived from the Act of June 3, 1864, 13 Stat. 99, which was the National Bank Act. During this period, a multitude of changes in the Act [fol. 45] have occurred as various economic problems were encountered. The provisions of the Act affecting branch banking entered the scene in 1927. Before that time branch banking was not generally sanctioned by Congress. See First National Bank v. Missouri, 263 U.S. 640. The Court there noted that the various state laws are binding on the dealings and contracts of national banks unless and until those laws conflict with federal laws or frustrate the purpose for which national banks were created or impair their efficiency. With national banks unable to branch, state banks did branch where state law permitted placing the national banks at a considerable disadvantage in the competitive banking field. It was against this background that Congress provided for national bank branches in the McFadden Act of 1927, 44 Stat. 1224, 1228 on branch banking.[3] Congressman McFadden reported on this bill from the Committee on Banking and Currency. In the beginning, the Committee Report states, "Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have been successfully operating within [fol. 46] recent years."[4] Later in the same report in discussing Section 8 it is stated, "This section recognizes the right of national banks to establish branches within those

[3] "(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question."

[4] H. Rept. No. 83, 69th Cong., 1st Sess. (1926).

cities in which State banks have that privilege • • • ." Finally, the report concludes in part with, "The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks." It seems clear to us at this juncture, that Congress meant in the McFadden Act to put national banks on a par with state banks insofar as branching was concerned, and to do this, they made state law controlling on the question of national bank branches. But our investigation of the history of branch banking cannot end here, for in 1932, owing to the financial crisis of those times, Congress again considered branching by national banks.

In 1932 the Senate considered a bill (Senate Bill 4412) which would allow branch banking by national banks irrespective of the various state laws. Senator Glass, the committee chairman, did point out at the time that this was a highly controversial subject.[5] The main objection the op- [fol. 47] ponents had to this bill concerning the branching provision was that it would constitute an invasion of the sovereign rights of the states to establish federal banks within their boundaries not approved by local policy. Apparently at this time, most states did not approve of branch banking.[6] It was at this time that Senator Bratton[7] of New Mexico offered his amendment to the bill which as modified was finally passed. We deem Senator Bratton's comments in regard to the bill highly noteworthy when in Vol. 76, Cong. Rec. p. 1449, he indicated that under existing law a national bank may engage in branch banking if the law of the state where the national bank is situated permits state banks to do so. Then in commenting on the

[5] Cong. Rec. Vol. 75, p. 9890.

[6] See Cong. Rec. Vol. 75, pp. 9891, 13,002; Vol. 76, pp. 1449, 1997, 2079, 2080, 2090, 2205, 2206.

[7] The Honorable Sam G. Bratton later became a distinguished and highly esteemed member of this court, serving from 1933 until his retirement in 1961.

Glass bill he said, "It is proposed to permit national banks to engage in branch banking whether the law of the State in which a given bank is located permits it or not. It is proposed now to permit national banks to disregard the sentiment of a given State with respect to that question. I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted [fol. 48] in a given State should be determined by the State." The Bratton Amendment was then presented and adopted in the Glass bill.[8] This amendment concerning branch banking also expanded national banks into outside branches or branches outside the city or town of the parent bank. This is (c)(2) of the present section concerning such banks.

Although the Glass Bill including the Bratton Amendment passed the Senate, it failed to pass the House until the next session when the bill was passed by both houses with the Bratton Amendment intact. Two other Congressional comments made in 1933, when § 36(c) was under consideration in the Congress, one by Senator Glass[9] and the other by

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[8] Cong. Rec. Vol. 76, p. 2205. The amendment read as follows with its amendment.

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000."

[9] Senator Glass, in Vol. 77 Cong. Rec. 3726 (1933) said:

"There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those

[fol. 49] Congressman Luce,[10] support our interpretation of this statute.

With this, our review of the history of branch banking and § 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This [fol. 50] policy was again carried over in the Banking Act of 1933 through the Bratton Amendment despite the fact that originally the Glass bill sought to change that policy. It seems to us a frustration of that policy to say as the trial court did that merely because a state in a broad general way sanctions branch banking, that is enough to permit a national branch, even though other vital provisions of

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States which by law permit branch banking to State Banks. It went even further under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks.

"How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate."

[10] Congressman Luce stated in Cong. Rec. Vol. 77, p. 5896:

"In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail."

state branching laws are not met. In other words, we believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it.[11] While we entertain no doubt of Congress' authority to regulate national banks in whatever way it deems fit, we are convinced that in this area of the law, Congress has restricted its power and acceded to state law which it may [fol. 51] certainly do. It is clear to us that the Congress intended to create and maintain a competitive equality between state and national banks. The trial court's interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage. The Comptroller exceeded his statutory authority in the issuance of the certificate authorizing appellee bank to establish and maintain the branch bank.

We will refrain from passing on any of the affirmative defenses raised by the answer of The First National Bank of Logan because the trial court must properly be given the first opportunity to determine their merits, if any. The judgment of the tiral court is Reversed and the case is Remanded with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent herewith.

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[11] For other cases tending to support this view although each construing § 36(c)(2) dealing with outside branches instead of (c)(1) see the following. National Bank of Detroit v. Wayne Oakland Bank, 6 Cir., 252 F.2d 537, cert. denied, 358 U.S. 830; State of South Dakota v. National Bank of South Dakota, 219 F. Supp. 842; Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770, aff'd per curiam, 278 F.2d 871 (D.C.Cir. 1960); and see Rushton Ex Rel. Comr. of Bkg. v. Michigan National Bank, 298 Mich. 417, 299 N.W. 129, 136 ALR 458. We also note, in a factually similar case construing (c)(1) from Utah decided by the U.S. District Court, District of Columbia, held exactly as we do here. Commercial Security Bank v. Saxon, 236 F. Supp. 457 (1964).

[fol. 52]

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—October 26, 1965

Twenty-Ninth Day, September Term

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the trial court is reversed and the case is remanded with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent with the opinion of the court. It is further ordered that Walker Bank & Trust Company, a corporation, appellant, have and recover of and from The First National Bank of Logan, of Logan, Utah, a National banking association, appellee, its costs herein and have execution therefor.

Petition for Rehearing covering 14 pages filed November 12, 1965 omitted from this print. It was denied, and nothing more by order December 3, 1965.

[fol. 53]

IN THE UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—December 3, 1965

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[fol. 54] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. 875, October Term, 1965

THE FIRST NATIONAL BANK OF LOGAN, UTAH, Petitioner,

v.

WALKER BANK & TRUST COMPANY.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with Nos. 1009 and 1126 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1009

FIRST SECURITY BANK OF UTAH, N.A.,
PETITIONER,

vs.

COMMERCIAL SECURITY BANK.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,356

First Security Bank of Utah, N. A.
Ogden, Utah, *Appellant*,

v.

Commercial Security Bank, Ogden, Utah, *Appellee*.

Joint Appendix

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[fol. 1]

In United States District Court
For the District of Columbia

Docket Entries

Docket 1815-63

1963

July 18—Summons, copies (3) and copies (3) of Complaint issued ser. 7-18; Ab ser. 7-19; DA ser. 7-19.

July 18—Motion of Pltff. for Temporary Restraining Order, Affidavits (2); Exhibits A & B; P & A.—filed.

July 18—Motion of Pltff. for Preliminary Injunction; P & A—filed.

July 19—Injunction undertaking of James F. Bell, attorney for Pltff. in the sum of One Hundred Dollars—filed.

July 19—Temporary Restraining Order; $100.00 undertaking; issued at 10:00 A.M. (N) ser. 7-19; DA ser. 7-19; AG ser. 7-20, Curran, J.

July 19—Order fixing July 29, 1963 at 10:00 A.M. for hearing on Motion for Preliminary Injunction (N) Curran, J.

July 26—Motion of Pltff. for postponement of date of hearing of motion for preliminary injunction; Exhibit A—filed.

November 8—Consent Order extending time for deft. to plead to and including December 1, 1963. (N) Holtzoff, J.

December 2—Consent Order extending time for deft. to plead to and including January 3, 1964 (N) McGarraghy, J.

1964

January 2—Consent Order extending time for deft. to plead to and including February 3, 1964 (N) Holtzoff, J.

[fol. 2] February 4—Consent order extending deft.'s time to plead or otherwise defend to March 3, 1964 (N).

March 5—Order extending time to answer to and including April 3, 1964 (N). Keech, J.

April 13—Consent order extending deft.'s time to answer to and including May 4, 1964 (N) Curran, J.

May 27—Consent order extending time to answer to and including July 1, 1964 (N) Curran, J.

June 26—Motion of First Security Bank of Utah, N.A., for leave to intervene; c/m 7-25-63; points and authorities; Exhibit; Deposit by John J. Wilson, $5.00; appearance of Whiteford, Hart, Carmody & Wilson (815-15th Street, N.W.), as attorneys for Applicant; M.C. 6-26-64.—filed.

June 26—Motion of deft. to dismiss; c/m 6-26-64; Memorandum; M.C. 6-26-64.—Filed.

June 26—Motion of intervenor for summary judgment; c/m 6-25-64; Memorandum M.C. 6-30-64—filed.

June 26—Order granting Motion of First Security Bank of Utah, N.A., to intervene as party defendant (N) Curran, J.

July 6—Cross Motion of Pltff. for summary judgment; Statement of material facts; points and authorities in support of Cross Motion and in opposition to deft.'s Motions; c/m 7-6-64; M.C. 7-6-64—filed.

July 17—Statement of material facts in support of motion of deft. No. 2 for summary judgment; c/mailing—filed.

August 13—Opposition of deft. No. 2 to pltff.'s Motion for Summary Judgment. c/m 8-12-64.

October 5—Supplemental Memorandum of pltff. in support of Cross Motion for summary judgment; Appendix A and B; ser/ack. 10/5/64—filed.

October 7—Motion to dismiss; Motion for summary judgment by intervenor and Cross Motion for summary judgment by intervenor and Cross Motion for summary judgment argued and taken under advisement. (Rep. Roger E. Frye) Walsh, J.

October 7—Memorandum of deft. James J. Saxon—filed.

[fol. 3] October 19—Appearance Brian C. Elmer as attorney for pltff.—filed.

December 18—Memorandum and Order denying motion of defendant to dismiss; denying motion of Intervenor-Defendant for summary judgment; and granting Motion of pltff. for summary judgment; deft. is enjoined from authorizing the establishment of the branch bank by the Intervenor-Defendant, (N) Micro. 12/21/64 Walsh, J.

1965

February 12—Notice of Appeal by Intervenor from Order 12/18/64; copies to James Bell, U.S. Attorney and Attorney General; Deposit $5.00 by C. Steele—filed.

February 15—Appearance Richard S. Beatty, as Attorney for deft. No. 1.—filed.

February 15—Notice of appeal by Deft. no. 1 from Order 12/18/64; copy to James Bell and Whiteford, Hart, Carmody & Wilson.

February 17—Cost bond on appeal by pltff. in sum of $250.00 with The Travelers Indemnity Company—approved. "fiat" Matthews, J.

March 17—Order extending time for deft. no. 1 to file and docket record on appeal to fifty (50) days to and including May 13, 1965 (N) Walsh, J.

March 19—Order extending time for Intervenor, First Security Bank of Utah, N.A. to file and docket record on appeal for 50 days, to and including May 13, 1965 (N) Matthews, J.

May 12—Record on appeal delivered to USCA. Deposit by C. J. Steele $1.55—filed.

May 12—Receipt from USCA for original papers—filed.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, Plaintiff,

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, Defendant.

MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed July 18, 1963

Now comes the plaintiff by its undersigned attorney and moves this Court as follows:

To grant forthwith and without notice a temporary restraining order restraining and enjoining the defendant

or his agents from issuing to the First Security Bank of Utah, N.A. a Certificate or any other writing approving and authorizing the establishment and operation by the said First Security Bank of Utah, N.A. of a branch bank at a location on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, pending a hearing on, and disposition of plaintiff's Motion for Preliminary Injunction filed herein on July 18, 1963; and for cause refers to the Affidavits attached hereto, and made a part hereof, and to the Statement of Points and Authorities in support of this Motion, and further refers to the Complaint Requesting Declaratory Judgment and Injunctive Orders and to the Motion for Preliminary Injunction, both filed herein on July 18, 1963.

James F. Bell, Attorney for Plaintiff, 1001 Connecticut Avenue, Washington 6, D. C., Telephone: EX 3-5333

Neil R. Olmstead, Ogden, Utah, Of Counsel.

[fol. 5]

AFFIDAVIT OF ROBERT G. HEMINGWAY IN SUPPORT OF MOTION

State of Utah
County of Weber ss

Robert G. Hemingway, being first duly sworn, on oath deposes and says:

He is President of Commercial Security Bank, plaintiff in the above entitled action, and as such he makes and submits this affidavit for and on behalf of said Bank in support of its motion for a temporary restraining order and preliminary injunction therein.

Commercial Security Bank is a banking corporation organized and existing under the laws of Utah. Its prin-

cipal office and place of business is at 2491 Washington Boulevard, within the corporate limits of Ogden, Utah, and it has a branch office within the corporate limits of said Ogden, Utah, located at 458 25th Street. By the laws of Utah it is restricted from establishing any additional branch in the said City of Ogden.

Plaintiff, Commercial Security Bank, has customers and depositors who reside or have their places of business in the vicinity of the location of the proposed branch of the First Security Bank of Utah, N. A., and affiant verily believes,

1. As of July 1, 1963, the number of depositors of plaintiff Bank who reside within a one mile radius of the location of the proposed branch of First Security Bank of Utah, N, A. exceeds fifteen percent of plaintiff's total depositors.

2. The deposits of plaintiff's depositors who reside within such one mile radius exceeds fifteen percent of all of plaintiff's demand deposits.

3. The total of loans made by plaintiff to borrowers residing within such one mile radius exceeds fifteen percent of all loans made by plaintiff.

[fol. 6] A field examination of the application for the proposed branch was ordered by the Comptroller and such examination was completed today, July 16, 1963. Affiant is informed and believes that a report of such field examination will be immediately forwarded by the Examiner to his Regional Office in Denver, Colorado, and from there to the Comptroller of the Currency in Washington, D. C., and such report will be received by the Comptroller within a period of five to seven days from this date. Affiant is further informed that it is the policy of the Comptroller to act upon applications for branch banks immediately upon receipt of the Examiner's report, and affiant believes that the Comptroller will act upon the application of First Se-

curity Bank of Utah, N. A. for its proposed branch referred to above immediately upon receipt of the Examiner's report thereon.

Should the Comptroller of the Currency authorize the First Security Bank of Utah, N. A., which is the largest bank in the City of Ogden with combined resources in excess of Three Hundred Sixty Million ($360,000,000.00) Dollars, to open a branch bank in the area it proposes, plaintiff will necessarily suffer severe loss of loans, deposits and other business and will sustain damage to its business and profits of upwards of Fifty Thousand ($50,000.00) Dollars a year. Additionally, if the Comptroller of the Currency is permitted to issue his Certificate of Authority to First Security Bank of Utah, N. A. to open and operate the said branch, plaintiff would have no adequate remedy at law.

Dated July 16, 1963.

Robert G. Hemingway.

Subscribed and sworn to before me this 16th day of July, 1963.

Neil R. Olmstead, Notary Public, Residing at Ogden, Utah.

My commission expires: March 24, 1967.

[fol. 7]

AFFIDAVIT OF JAMES F. BELL IN SUPPORT OF TEMPORARY RESTRAINING ORDER

City of Washington
District of Columbia ss:

James F. Bell, being duly sworn, deposes and states:

1. That I am an attorney duly admitted to practice before the United States District Court for the District of Columbia.

2. On this day, July 18, 1963, at the request and by the direction of the plaintiff, Commercial Security Bank of Ogden, Utah, I have filed herein a Complaint for Declaratory Judgment and Injunctive Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation by the First Security Bank of Utah, N. A. (a national banking association) of a branch bank on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, and at the same time I filed a Motion for Preliminary Injunction to restrain defendant from issuing said Certificate during the pendency of that Complaint.

3. The basis of the aforesaid Complaint and Motion is that defendant is prohibited by Title 12 United States Code, Section 36, from approving and authorizing a branch office of the aforesaid First Security Bank of Utah, N. A. at the location above-described.

4. As stated in the Affidavit of Mr. Robert G. Hemingway, President of Commercial Security Bank, the field investigation on the application of the First Security Bank of Utah, N. A. for a branch at the above location has been completed and the application, with the report thereon, will be at the Comptroller's office awaiting decision early next week.

5. It has been the announced policy of the defendant to give expeditious action to all applications of National banks

for branches. I verily believe, therefore, that the defendant may issue a certificate of authority to the First Security Bank of Utah, N. A. before this Court has an opportunity [fol. 8] to hear, or to act upon, plaintiff's pending Motion for a Preliminary Injunction.

6. The Complaint and the Motion for Preliminary Injunction herein allege, and I verily believe, that after the defendant issues his Certificate to the First Security Bank of Utah, plaintiff will have no legal remedy to prevent the operation of such branch office by said Bank at the allegedly illegal location on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

7. If defendant is not restrained immediately from issuing his Certificate of approval and authority to the First Security Bank of Utah, N. A. of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, the said Bank will, as soon as it receives defendant's certificate, open for business and commence operation of a branch office at the allegedly illegal location above-described, to the irreparable loss, injury and damage to the banking business of the plaintiff, and that the issuance by defendant of his Certificate will deprive the plaintiff of any legal remedy against such illegal action of the defendant.

James F. Bell.

City of Washington
District of Columbia ss:

Subscribed and sworn to before me this 18th day of July, 1963.

Mary Marticelli, Notary Public.

My Commission Expires Oct. 31, 1966.

(Seal)

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—
Filed July 18, 1963

Comes now the plaintiff herein and respectfully moves this Court to grant a preliminary injunction restraining the defendant from issuing his Certificate approving and [fol. 9] authorizing the establishment and operation by the First Security Bank of Utah, N. A., of a branch on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah.

In support of such motion plaintiff states to the Court as follows:

1. Plaintiff is filing, simultaneously with this motion, a Complaint for Declaratory Judgment and Injunctive Orders against defendant requesting—

(a) A determination that the establishment and operation by the First Security Bank of Utah, N. A., (a national banking association) of a branch bank at the location above described would be a violation of Title 12 United States Code, Section 36 (National Banking Act);

(b) Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation of such branch bank; and

(c) Such other and further relief as the facts and circumstances may require.

2. Plaintiff Commercial Security Bank, does now operate, and since July 30, 1925 has operated, a bank in Ogden, Utah, which bank was duly established under the laws of the State of Utah. In addition to its principal office it also operates a branch office in that city.

3. Title 12 United States Code, Section 36(c), authorizes the establishment and operation of branches by National Banks, with the approval of the Comptroller of the Currency, at locations where State banks are expressly per-

mitted by State law to establish and operate branches. The law of the State of Utah prohibits the establishment and operation of branches of State banks in a city or town in which is located any bank regularly transacting a banking business, with certain exceptions not here applicable relating to cities of the "first class." Utah Code Ann. Tit. 7, Chap. 3, Sect. 6. As the proposed location for the proposed [fol. 10] branch of the First Security Bank of Utah, N. A. is within the City of Ogden where there are presently three banks regularly transacting a banking business (Plaintiff, the Bank of Utah, and the Bank of Ben Lomand), the approval of the establishment of such branch by the defendant herein would be illegal.

4. Plaintiff further alleges, upon information and belief, that despite the prohibition of law described in paragraph 3 above, a field investigation by a National Bank Examiner of the application of the First Security Bank of Utah, N. A. for a branch has been completed, and that the said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the location described in its pending application, all in contravention of Title 12 United States Code, Section 36.

5. The issuance of the aforesaid Certificate by the defendant to the First Security Bank of Utah, N. A. would constitute conclusive legal authority of said bank to establish and operate its proposed branch at the location hereinbefore described, and such action could not be challenged by plaintiff in any subsequent proceeding. Therefore, the plaintiff has no adequate remedy at law.

6. Plaintiff further alleges that the issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The First Security Bank of Utah, N. A. is a much larger bank

than is plaintiff. The location at which it proposes to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden. A substantial number of the customers, depositors, and borrowers of the plaintiff are located in the vicinity of the proposed branch. If the First Security Bank of Utah, N. A., a bank many times larger than plaintiff, were allowed [fol. 11] to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury of the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

Wherefore, plaintiff prays the Court to hear this Motion promptly and to issue its preliminary injunction restraining defendant from issuing his Certificate above described pending the hearing and determination of the complaint herein filed.

James F. Bell, Attorney for Plaintiff, 1001 Connecticut Avenue, Washington 6, D. C., Telephone: EX 3-5333.

Neil R. Olmstead, Ogden, Utah, Of Counsel.

IN UNITED STATES DISTRICT COURT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE ORDER—Filed July 18, 1963

1. Plaintiff is a banking corporation organized under the laws of the State of Utah. Defendant is a duly constituted officer of the Executive Branch of the Government of the United States maintaining his official place of business in the District of Columbia and is an "agency" of the said Government within the meaning of Title 5 United States Code, Section 1001.

This action arises under Section 36 of Title 12 of the United States Code, commonly referred to as the National

Bank Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah, where it has a large investment in capital, property, equipment and goodwill, irreparable damage to which is threatened by certain action of the defendant described hereinafter. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

[fol. 12] This is a proceeding (1) for a declaratory judgment that the issuance by the defendant Comptroller of the Currency of his Certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, would constitute a violation of Title 12 United States Code, Section 36, and (2) to enjoin the defendant Comptroller of the Currency from issuing to the First Security Bank of Utah, N. A. his Certificate of Authority for the establishment and operation of a branch bank on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

2. Plaintiff is a state bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the authority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah.

3. Upon information and belief, on or about June 25, 1963, the First Security Bank of Utah, N. A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Blvd., between 30th and 36th Streets, in Ogden, Utah.

4. The First Security Bank of Utah, N. A., is a national banking association chartered by the Comptroller of the

Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office.

5. The approval and authorization by the defendant Comptroller of the Currency of the establishment and operation of a branch bank at the designated location by the [fol. 13] First Security Bank of Utah, N. A. is prohibited by Title 12 United States Code, Section 36(c). Title 12 United States Code, Section 36 provides in part as follows:

> "The conditions upon which a national banking association may . . . establish and operate a branch or branches are the following:
>
> • • • • • • •
>
> "(c) A national banking association may, *with the approval of the Comptroller of the Currency,* establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . . " (Emphasis supplied)

Under the foregoing provisions of Federal law a national banking association is accorded the right to establish and operate a branch with the approval of the Comptroller of the Currency only at such locations as the statute law of the State specifically authorizes State banks to establish and operate branches.

6. The statute law of the State of Utah, Utah Code Ann. Title 7, Chap. 3, Sect. 6 (1953, as amended), prohibits branches in any city or town in which is located any bank regularly transacting a customary banking business, with certain exceptions not here applicable relating to cities of the "first class":

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be estab-

lished in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. . . ."

[fol. 14] A city of the "first class" is defined under the statute law of Utah as one with a population in excess of 90,000 persons, while a city of the "second class" is defined as one with more than 30,000 and less than 90,000, persons. Utah Code Ann. Title 10, Chap. 1, Sect. 1, (1953 as amended). The City of Ogden is a city of the "second class".

7. The designated location of the proposed branch of the First Security Bank of Utah, N. A. is on Harrison Blvd., between 30th and 36th Streets, in the City of Ogden, Utah. There are three other banks regularly transacting a banking business in the City of Ogden, Utah. Plaintiff, as stated above, has both its main office and one branch in the City of Ogden. Two other banks also have their main offices located in the City of Ogden: the Bank of Utah, and the Bank of Ben Lomand.

8. Plaintiff alleges on the basis of the above-quoted provisions of the National Bank Act and of the statute law of Utah, that the establishment and operation of a branch of the First Security Bank of Utah, N. A. in the City of Ogden is prohibited because there are three other banks regularly transacting a customary banking business in said City. Accordingly, the issuance by the defendant of his Certificate approving and authorizing such proposed branch at the designated location would be illegal and in violation of Title 12 United States Code, Section 36.

9. Plaintiff alleges upon information and belief that, despite the patent prohibition of law described above, the field investigation of the application of the First Security Bank of Utah, N. A. for a branch by a National Bank Ex-

aminer has been completed, and that said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice of intention to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the loca-
[fol. 15] tion described in its pending application, all in contravention of Title 12 United States Code, Section 36.

10. Plaintiff further alleges that the issuance by defendant of his Certificate to the First Security Bank of Utah, N. A. will confer upon said Bank conclusive legal authority to establish and operate a branch in the vicinity of the location described therein; that under the precedent of prior judicial decisions the plaintiff may not challenge the validity of the said Certificate in a proceeding against the said Bank; and that plaintiff therefore has no adequate remedy at law.

11. Plaintiff further alleges that the unlawful issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The location at which it is proposed to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden, and a substantial number of plaintiff's customers, depositors, and borrowers are located in the vicinity of the proposed branch. Accordingly, if the First Security Bank of Utah, N. A., a bank which is many times larger than is plaintiff, were allowed to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury to the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

Wherefore, plaintiff prays:

1. That the court enter a judgment declaring and adjudging that the defendant is prohibited by Title 12 United

States Code, Section 36, from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

[fol. 16] 2. That the court enter its order enjoining the defendant from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

3. That the court, pending the final determination of this cause issue a preliminary injunction, restraining and enjoining defendant in the aforesaid manner and form.

4. That, pending the issuance of the aforesaid preliminary injunction, the court issue forthwith a temporary restraining order restraining and enjoining defendant in the aforesaid manner and form.

5. That the court grant plaintiff such other and further relief as may be just and proper.

James F. Bell, Attorney for Plaintiff, 1001 Connecticut Avenue, Washington 6, D. C., Telephone: EX 3-5333.

Neil R. Olmstead, Ogden, Utah, Of Counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, Plaintiff,

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, Defendant,

and

FIRST SECURITY BANK OF UTAH, N.A., Ogden, Utah,
Applicant for Intervention.

[fol. 17]

MOTION OF FIRST SECURITY BANK OF UTAH, N.A., FOR LEAVE TO INTERVENE—Filed June 26, 1964

Comes now the First Security Bank of Utah, N.A., a banking corporation organized and existing under and by virtue of the laws of the United States of America, Ogden, Utah, through its undersigned attorneys, and moves the Court for leave to intervene in the above-captioned civil action as a party defendant, and to move or plead in its own behalf and oppose motions of the plaintiff, within the time allowed the defendant Saxon to do the same.

Applicant is the same First Security Bank of Utah, N.A., frequently referred to in the complaint and in the plaintiff's other papers filed herein; and seeks to intervene because the representation of its interest by the defendant Saxon may be inadequate and applicant may be bound by a judgment in this action; and because applicant's defense

and the main action have questions of law and of fact in common.

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Address: 815-15th Street, N.W., Washington 5, D. C., Attorneys for Applicant for Intervention.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING INTERVENTION AS PARTY DEFENDANT—June 26, 1964

Upon consideration of the motion of applicant, First Security Bank of Utah, N.A., for leave to intervene herein as a party defendant, and it appearing to the Court that applicant is entitled to intervene pursuant to the provisions of Rule 24 F.R.Civ.P., and it further appearing that the parties plaintiff and defendant do not oppose such motion, it is, by the Court, this 26th day of July, 1963

Ordered and Adjudged, that said motion to intervene be and it is hereby granted; and that the intervenor may [fol. 18] move or plead in its own behalf and oppose motions of the plaintiff, within the time allowed the defendant Saxon to do the same; and it is further

Ordered and Adjudged, that the intervenor, for good cause shown, is excused from the provision of Rule 24(c) requiring its motion to be accompanied by a pleading setting forth the defense for which intervention is sought.

Edward M. Curran, District Judge.

Do Not Oppose

James F. Bell, 1001 Connecticut Avenue, N.W., Washington, D. C., Attorney for plaintiff.

John W. Douglas, Assistant Attorney General, By R. Dickey Hamilton, c/o Department of Justice, Washington, D. C., Attorney for defendant Saxon.

IN UNITED STATES DISTRICT COURT

CROSS MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT—Filed July 6, 1964

Comes now the Plaintiff, which opposes Defendant First Security Bank's motion for summary judgment, and moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor against Defendant Comptroller on the following grounds:

1. There is no genuine issue as to any of the material facts upon which Plaintiff relies in support of its cross motion, and

[fol. 19] 2. Plaintiff is entitled to summary judgment as a matter of law.

James F. Bell, Attorney for Plaintiff, Commercial Security Bank of Ogden, 1001 Connecticut Avenue, N.W., Washington 6, D. C.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL CIVIL RULE 9(H)—Filed July 17, 1964

Plaintiff, in support of its cross-motion for summary judgment herein, and pursuant to Rule 9(h) of the Local Rules of this Court, hereby sets forth a statement of the material facts in support to its cross-motion for summary judgment and contends there is no genuine issue as to these facts so stated:

1. Plaintiff is a State bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the au-

thority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah. (Complaint, para. 2)

2. On June 25, 1963, the First Security Bank of Utah N.A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Boulevard, [fol. 20] between 30th and 36th Streets, in Ogden, Utah. (Complaint, para. 2; Memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 1)

3. The First Security Bank of Utah, N.A., is a national banking association chartered by the Comptroller of the Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office and one branch (Complaint, para. 4; Memorandum of Defendant First Security in Support of Motion for Summary Judgment, para. 2).

4. There are four banks transacting business in the City of Ogden, Utah. Plaintiff, Defendant First Security Bank of Utah, N.A., the Bank of Utah, and the Bank of Ben Lomand. (Complaint, para. 7)

5. The City of Ogden (1960 Pop. 70,197) is a city of the "second class", as such city is defined in Utah Code Ann. Title 10, Chap. 1, Sec. 1 (1953 as amended), having a population of more than 30,000 and less than 90,000 persons. (Complaint, para. 6)

6. On June 9, 1964, the Defendant Comptroller notified the Defendant First Security Bank of Utah that its branch application was approved, but he has not yet set a date for the issuance of the certificate of authority authorizing Defendant First Security to operate such branch.

7. On July 19, 1963, Judge Curran issued a temporary restraining order prohibiting the Comptroller from issuing

a certificate of authority to First Security. Prior to the expiration date of that order, counsel for Commercial Security and Comptroller filed a Stipulation with this Court by which it was agreed "that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction," and "that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the [fol. 21] Comptroller's intention to issue the certificate, Commercial Security Bank will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction". Notice has not been given pursuant to the Stipulation. (Stipulation between counsel for Commercial Security and Defendant Comptroller filed with this Court; memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 2.)

Respectfully submitted,

James F. Bell, Attorney for Plaintiff, Commercial Security Bank of Ogden, 1001 Connecticut Avenue, N.W., Washington 6, D. C.

In United States District Court

Motion of Intervenor for Summary Judgment—
Filed June 26, 1964

Comes now Intervenor, First Security Bank of Utah, N.A., and moves this Honorable Court to grant summary judgment on behalf of Defendants herein and as grounds therefor states:

1. There is no dispute between the parties as to any relevant facts herein.

2. As a matter of law, the Comptroller of the Currency:

(a) has the authority to issue a branch certificate to Intervenor;

(b) is not bound by Utah law except as to location, and, therefore, has discretionary power to grant the authority to establish a branch to Intervenor.

[fol. 22] Wherefore, the premises considered, Intervenor, First Security Bank of Utah, prays that this Honorable Court grant its Motion for Summary Judgment.

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Charles J. Steele, 815-15th Street, N.W., Washington, D. C. 20005, Attorneys for Intervenor, First Security Bank of Utah, N.A.

IN UNITED STATES DISTRICT COURT

DEFENDANT, FIRST SECURITY BANK OF UTAH'S, STATEMENT OF MATERIAL FACTS UNDER RULE 9(H)—Filed July 17, 1964

Defendant, First Security Bank of Utah, in support of its Motion for Summary Judgment herein, and pursuant to Rule 9(h) of this Court, hereby sets forth a Statement of Material Facts in support of its Motion for Summary Judgment:

1. Plaintiff, Commercial Security Bank, is a State bank with its principal office in Ogden, Utah.

2. Defendant, First Security Bank of Utah, is a National bank with its principal office in Ogden, Utah.

3. Defendant, First Security Bank of Utah, a National bank, applied to the Comptroller of the Currency on June 25, 1963 for authority to open a branch in Ogden, Utah, on Harrison Avenue.

4. Subsequently, on July 3, 1963, the Plaintiff, Commercial Security Bank, filed its application to move its 25th Street Branch to Harrison Boulevard. On July 11, 1963, the State Banking Commission gave its written approval to said Bank for the change in location as requested.

[fol. 23] 5. On July 18, 1963, Plaintiff filed its Motion herein for Declaratory Judgment, Injunctive Order and for a Preliminary Injunction.

6. Banks located in Ogden, Utah, are:

(1) Plaintiff, Commercial Security Bank;

(2) Defendant, First Security Bank of Utah;

(3) The Bank of Utah; and

(4) The Bank of Ben Lomand.

Respectfully submitted,

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Charles J. Steele, 815-15th Street, N.W., Washington, D. C. 20005, Attorneys for Defendant, First Security Bank of Utah, N.A.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, TO DISMISS THE COMPLAINT—Filed October 7, 1964

Defendant, James J. Saxon, Comptroller of the Currency, by his undersigned attorneys, moves the Court to enter an order dismissing the complaint upon the grounds that:

1. Plaintiff lacks standing to maintain this action, and
2. The complaint fails to state a claim upon which relief can be granted.

[fol. 24] Attached hereto and in support of this motion is a memorandum of points and authorities.

John W. Douglas, Assistant Attorney General.

Harland F. Leathers, R. Dickey Hamilton, Attorneys, Department of Justice, Attorneys for James J. Saxon, Comptroller of the Currency.

In United States District Court

Memorandum and Order—December 18, 1964

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the "second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the Currency, pursuant to Title 12, United State Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18, 1963, [fol. 25] the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U.S.C.A. § 36, and an injunction to restrain the Comptroller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, on July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

". . . that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction . . . that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction."

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit. The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its busi- [fol. 26] ness and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company,* 323 F. 2d 290, 300 (C.A.D.C., 1963), cert. granted 376 U.S. 948:

"The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would

result in irreparable injury to their property rights in their charters."

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra*, at page 300, the Court stated, ". . . there is no discretion to unlawfully issue a certificate", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U.S.C. § 36(c) (1927, as amended), which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish [fol. 27] and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . .* ". [emphasis supplied].

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks,

state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.*" [emphasis supplied].

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would clearly have been denied.[1] The question before this Court, there-
[fol. 28] fore, has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

The defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the

[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co.* v. *Taylor,* 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was " . . . the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches." (at page 775). Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, recently held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defen-[fol. 29] dant national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish a new branch. The *Commercial Bank of Roseville* case, *supra,* as well as other cases emphasizing the controlling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels impelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12, U.S.C.A. §§ 21-213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states [fol. 30] are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states at that time did allow branching, however, and as a result, the competitive situation was so imbalanced that the Comptroller in his 1924 report (Government Printing Office), stated at page 4:

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[2] 12 U. S. C. A. §§ 36(c), 51, 85, 92a(a), and 214c.

"The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system."

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c) (1933, as amended) set out below:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such [fol. 31] establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks . . .".

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra,* that it is bound to hold that the exact standards of the Utah branching law must be

applied to the First Security Bank of Utah, N.A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Currency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N.A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets, [fol. 32] Ogden, Utah, would constitute a violation of 12 U.S.C.A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

Ordered, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

Ordered, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

Ordered, that the Motion for Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

It Is Further Ordered, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N.A., which is the subject matter of this cause of action.

Leonard P. Walsh, Judge.

In United States District Court

Notice of Appeal—Filed February 12, 1965

Notice is hereby given this 12th day of February, 1965, that First Security Bank of Utah, N.A., Intervenor-Defendant, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in favor of Plaintiff, Commercial Security Bank, against said [fol. 33] Defendants, First Security Bank of Utah, N.A. and James J. Saxon, Comptroller of the Currency.

Charles J. Steele, Attorney for First Security Bank of Utah, N.A.

In United States District Court

Notice of Appeal—Filed February 12, 1965

Notice is hereby given this 15 day of February, 1965, that defendant, James J. Saxon, Comptroller of the Currency hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in

favor of Commercial Security Bank and against the defendant, James J. Saxon, Comptroller of the Currency.

Richard S. Beatty, Attorney for Def., James J. Saxon.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO DOCKET AND FILE RECORD—March 17, 1965

Pursuant to the provisions of Rule 73(g) of the Federal Rules of Civil Procedure, it is this 19th day of March, 1965,

Ordered, that the Intervenor First Security Bank of Utah's time for filing and docketing the record on appeal with the United States Court of Appeals for the District of Columbia Circuit is hereby extended fifty (50) days, to and including May 13, 1965.

Burnita Shelton Matthews, Judge.

[fol. 34]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

No. 19,356

FIRST SECURITY BANK OF UTAH, N. A., Appellant,

v.

COMMERCIAL SECURITY BANK, Appellee.

No. 19,357

JAMES J. SAXON, Comptroller of the Currency, Appellant,

v.

COMMERCIAL SECURITY BANK, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Wright and Tamm, Circuit Judges.

JUDGMENT—November 18, 1965

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed. *Walker Bank & Trust Company* v. *James J. Saxon, Comptroller of the*

Currency, et al., decided October 26, 1965, No. 7981, C.C.A. Tenth Circuit.

It is further Ordered by the court that all parties bear their own costs on these appeals.

Per Curiam.

Dated: Nov 18 1965

[fol. 35] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 36]

SUPREME COURT OF THE UNITED STATES

No. 1009, October Term, 1965

FIRST SECURITY BANK OF UTAH, N. A., Petitioner,

v.

COMMERCIAL SECURITY BANK.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 875 and 1126 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1126

JAMES J. SAXON,
COMPTROLLER OF THE CURRENCY, PETITIONER

vs.

COMMERCIAL SECURITY BANK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,357

JAMES J. SAXON, Comptroller of the Currency, APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

1963

July 18— Complaint, appearance.

July 18— Motion of Pltff. for Temporary Restraining Order, Affidavits (2); Exhibits A & B.

July 18— Motion of Pltff. for Preliminary Injunction.

July 19— Temporary restraining order; $100.00 undertaking; issued at 10:00 a.m. Curran, J.

July 19— Order fixing July 29, 1963 at 10:00 a.m. for hearing on motion for preliminary injunction Curran, J.

July 26— Motion of pltff. for postponement of date of hearing motion for preliminary injunction; exhibit A.

July 26— Order continuing hearing on motion for preliminary injunction indefinitely. Sirica, J.

1964

June 26— Motion of defendant to dismiss; c/m 6-26-64; memorandum.

1964

July 6— Cross motion of plaintiff for summary judgment; statement of material facts; points and authorities in support of cross motion and in opposition to defendants' motions.

[fol. 2]

Dec. 18— Memorandum and order denying motion of defendant to dismiss; denying motion of Intervenor-Defendant for summary judgment, and granting motion of plaintiff for summary judgment; defendant is enjoined from authorizing the establishment of the branch bank by the Intervenor-Defendant. Walsh, J.

1965

Feb. 15— Notice of appeal by defendant #1 from order 12/18/64; copy to J. Bell and Whiteford, Hart, Carmody and Wilson.

Mar. 17— Order extending time for deft. #1 to file and docket record on appeal fifty (50) days to and including May 13, 1965. Walsh, J.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, PLAINTIFF

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, DEFENDANT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE ORDERS—Filed July 18, 1963

1. Plaintiff is a banking corporation organized under the laws of the State of Utah. Defendant is a duly constituted officer of the Executive Branch of the Govern-

ment of the United States maintaining his offiicial place of business in the District of Columbia and is an "agency" of the said Government within the meaning of Title 5 United States Code, Section 1001.

This action arises under Section 36 of Title 12 of the United States Code, commonly referred to as the National Bank Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah, where it has a large investment in capital, property, equipment and goodwill, irreparable damage to which is threatened by certain action of the defendant described hereinafter. [fol. 3] The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

This is a proceeding (1) for a declaratory judgment that the issuance by the defendant Comptroller of the Currency of his Certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, would constitute a violation of Title 12 United States Code, Section 36, and (2) to enjoin the defendant Comptroller of the Currency from issuing to the First Security Bank of Utah, N. A. his Certificate of Authority for the establishment and operation of a branch bank on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

2. Plaintiff is a state bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the authority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah.

3. Upon information and belief, on or about June 25, 1963, the First Security Bank of Utah, N.A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish

and operate a branch bank on Harrison Blvd., between 30th and 36th Streets, in Ogden, Utah.

4. The First Security Bank of Utah, N. A., is a national banking association chartered by the Comptroller of the Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office.

5. The approval and authorization by the defendant Comptroller of the Currency of the establishment and operation of a branch bank at the designated location by the First Security Bank of Utah, N. A. is prohibited by Title 12 United States Code, Section 36(c). Title 12 United States Code, Section 36 provides in part as follows:

> "The conditions upon which a national banking association may . . . establish and operate a branch or branches are the following:
>
> * * * *
>
> [fol. 4] "(c) A national banking association may, *with the approval of the Comptroller of the Currency*, establishing and operate new branches: (1) Within the limits of the city, town, or village in which the said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . ." (Emphasis supplied)

Under the foregoing provisions of Federal law a national banking association is accorded the right to establish and operate a branch with the approval of the Comptroller of the Currency only at such locations as the statute law of the State specifically authorizes State banks to establish and operate branches.

6. The statute law of the State of Utah, Utah Code Ann. Title 7, Chap. 3, Sect. 6 (1953, as amended), prohibits branches in any city or town in which is located any bank regularly transacting a customary banking business, with certain exceptions not here applicable relating to cities of the "first class":

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the

first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establishing such branch shall take over an existing bank. . . ."

A city of the "first class" is defined under the statute law of Utah as one with a population in excess of 90,000 persons, while a city of the "second class" is defined as one with more than 30,000 and less than 90,000 persons. Utah Code Ann. Title 10, Chap. 1, Sect. 1, (1953 as amended). The City of Ogden is a city of the "second class".

7. The desigated location of the proposed branch of the First Security Bank of Utah, N. A. is on Harrison Blvd., between 30th and 36th Streets, in the City of Ogden, Utah. There are three other banks regularly transacting a banking business in the City of Ogden, Utah. Plaintiff, as stated above, has both its main office and one branch in the City of Ogden. Two other banks also have their main offices located in the City of Ogden: the Bank of Utah, and the Bank of Ben Lomand.

8. Plaintiff alleges on the basis of the above-quoted provisions of the National Bank Act and of the statute law of Utah, that the establishment and operation of a branch [fol. 5] of the First Security Bank of Utah, N. A. in the City of Ogden is prohibited because there are three other banks regularly transacting a customary banking business in said City. Accordingly, the issuance by the defendant of his Certificate approving and authorizing such proposed branch at the designated location would be illegal and in violation of Title 12 United States Code, Section 36.

9. Plaintiff alleges upon information and belief that, despite the patent prohibition of law described above, the field investigation of the application of the First Security Bank of Utah, N. A. for a branch by a National Bank Examiner has been completed, and that said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice of in-

tention to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the location described in its pending application, all in contravention of Title 12 United States Code, Section 36.

10. Plaintiff further alleges that the issuance by defendant of his Certificate to the First Security Bank of Utah, N. A. will confer upon said Bank conclusive legal authority to establish and operate a branch in the vicinity of the location described therein; that under the precedent of prior judicial decisions the plaintiff may not challenge the validity of the said Certificate in a proceeding against the said Bank; and that plaintiff therefore has no adequate remedy at law.

11. Plaintiff further alleges that the unlawful issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The location at which it is proposed to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden, and a substantial number of plaintiff's customers, depositors, and borrowers are located in the vicinity of the proposed branch. Accordingly, if the First Security Bank of Utah, N. A., a bank which is many times larger than is plaintiff, were allowed to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury of the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

WHEREFORE, plaintiff prays:

1. That the court enter a judgment declaring and adjudging that the defendant is prohibited by Title 12 United States Code, Section 36, from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Har-
[fol. 6] rison Blvd., between 30th and 36th Streets in Ogden, Utah.

2. That the court enter its order enjoining the defendant from issuing a Certificate of Authority authorizing

the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

3. That the court, pending the final determination of this cause issue a preliminary injunction, restraining and enjoining defendant in the aforesaid manner and form.

4. That, pending the issuance of the aforesaid preliminary injunction, the court issue forthwith a temporary restraining order restraining and enjoining defendant in the aforesaid manner and form.

5. That the court grant plaintiff such other and further relief as my be just and proper.

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff
1001 Connecticut Avenue
Washington 6, D. C.
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NEIL R. OLMSTEAD
Ogden, Utah
Of Counsel

IN UNITED STATES DISTRICT COURT

* * * *

MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed July 18, 1963

Now comes the plaintiff by its undersigned attorney and moves this Court as follows:

To grant forthwith and without notice a temporary restraining order restraining and enjoining the defendant or his agents from issuing to the First Security Bank of Utah, N.A. a Certificate or any other writing approving and authorizing the establishment and operation by the said First Security Bank of Utah, N.A. of a branch bank at a location on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, pending a hearing on, and disposition of plaintiff's Motion for Preliminary Injunction filed [fol. 7] herein on July 18, 1963; and for cause refers to the Affidavits attached hereto, and made a part hereof, and to the Statement of Points and Authorities in support of this Motion, and further refers to the Complaint Requesting Declaratory Judgment and Injunctive Orders and to the Motion for Preliminary Injunction, both filed herein on July 18, 1963.

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff
1001 Connecticut Avenue
Washington 6, D. C.
Telephone: EX 3-5333

NEIL R. OLMSTEAD
Ogden, Utah

Of Counsel

* * * *

AFFIDAVIT OF ROBERT G. HEMINGWAY IN SUPPORT OF MOTION—Filed July 18, 1963

STATE OF UTAH)
) ss
COUNTY OF WEBER)

ROBERT G. HEMINGWAY, being first duly sworn, on oath deposes and says:

He is President of Commercial Security Bank, plaintiff in the above entitled action, and as such he makes and submits this affidavit for and on behalf of said Bank in support of it's (sic) motion for a temporary restraining order and preliminary injunction therein.

Commercial Security Bank is a banking corporation organized and existing under the laws of Utah. It's (sic) principal office and place of business is at 2491 Washington Boulevard, within the corporate limits of Ogden, Utah, and it has a branch office within the corporate limits of said Ogden, Utah, located at 458 25th Street. By the laws of Utah it is restricted from establishing any additional branch in the said City of Ogden.

Plaintiff, Commercial Security Bank, has customers and depositors who reside or have their places of business in the vicinity of the location of the proposed branch of [fol. 8] the First Security Bank of Utah, N. A., and affiant verily believes,

1. As of July 1, 1963, the number of depositors of plaintiff Bank who reside within a one mile radius of the location of the proposed branch of First Security Bank of Utah, N. A. exceeds fifteen percent of plaintiff's total depositors.
2. The deposits of plaintiff's depositors who reside within such one mile radius exceeds fifteen percent of all of plaintiff's demand deposits.
3. The total of loans made by plaintiff to borrowers residing within such one mile radius exceeds fifteen percent of all loans made by plaintiff.

A field examination of the application for the proposed branch was ordered by the Comptroller and such ex-

amination was completed today, July 16, 1963. Affiant is informed and believes that a report of such field examination will be immediately forwarded by the Examiner to his Regional Office in Denver, Colorado, and from there to the Comptroller of the Currency in Washington, D. C., and such report will be received by the Comptroller within a period of five to seven days from this date. Affiant is further informed that it is the policy of the Comptroller to act upon applications for branch banks immediately upon receipt of the Examiner's report, and affiant believes that the Comptroller will act upon the application of First Security Bank of Utah, N. A. for its proposed branch referred to above immediately upon receipt of the Examiner's report thereon.

Should the Comptroller of the Currency authorize the First Security Bank of Utah, N. A., which is the largest bank in the City of Ogden with combined resources in excess of Three Hundred Sixty Million ($360,000,000.00) Dollars, to open a branch bank in the area it proposes, plaintiff will necessarily suffer severe loss of loans, deposits and other business and will sustain damage to it's (sic) business and profits of upwards of Fifty Thousand ($50,000.00) Dollars a year. Additionally, if the Comptroller of the Currency is permitted to issue his Certificate of Authority to First Security Bank of Utah, N. A. to open and operate the said branch, plaintiff would have no adequate remedy at law.

Dated July 16, 1963.

/s/ ROBERT G. HEMINGWAY

[fol. 9] Subscribed and sworn to before me this 16th day of July, 1963.

/s/ NEIL R. OLMSTEAD
Notary Public
Residing at Ogden, Utah

My commission expires:
March 24, 1967.

* * * *

AFFIDAVIT OF JAMES F. BELL IN SUPPORT OF TEMPORARY RESTRAINING ORDER—Filed July 18, 1963

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

James F. Bell, being duly sworn, deposes and states:

1. That I am an attorney duly admitted to practice before the District Court of the United States for the District of Columbia.

2. On this day, July 18, 1963, at the request and by the direction of the plaintiff, Commercial Security Bank of Ogden, Utah, I have filed herein a Complaint for Declaratory Judgment and Injunctive Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation by the First Security Bank of Utah, N. A. (a national banking association) of a branch bank on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, and at the same time I filed a Motion for Preliminary Injunction to restrain defendant from issuing said Certificate during the pendency of that Complaint.

3. The basis of the aforesaid Complaint and Motion is that defendant is prohibited by Title 12 United States Code, Section 36, from approving and authorizing a branch office of the aforesaid First Security Bank of Utah, N. A. at the location above-described.

4. As stated in the Affidavit of Mr. Robert G. Hemingway, President of Commercial Security Bank, the field investigation on the application of the First Security Bank of Utah, N. A. for a branch at the above location has been completed and the application, with the report [fol. 10] thereon, will be at the Comptroller's office awaiting decision early next week.

5. It has been the announced policy of the defendant to give expeditious action to all applications of National banks for branches. I verily believe, therefore, that the defendant may issue a certificate of authority to the First Security Bank of Utah, N. A. before this Court has an

opportunity to hear, or to act upon, plaintiff's pending Motion for a Preliminary Injunction.

6. The Complaint and the Motion for Preliminary Injunction herein allege, and I verily believe, that after the defendant issues his Certificate to the First Security Bank of Utah, plaintiff will have no legal remedy to prevent the operation of such branch office by said Bank at the allegedly illegal location on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

7. If defendant is not restrained immediately from issuing his Certificate of approval and authority to the First Security Bank of Utah, N. A. of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, the said Bank will, as soon as it receives defendant's certificate, open for business and commence operation of a branch office at the allegedly illegal location above-described, to the irreparable loss, injury and damage to the banking business of the plaintiff, and that the issuance by defendant of his Certificate will deprive the plaintiff of any legal remedy against such illegal action of the defendant.

/s/ JAMES F. BELL
JAMES F. BELL

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Subscribed and sworn to before me this 18th day of July, 1963.

/s/ MARY MARTICELLI
Notary Public

My Commission Expires Oct. 31, 1966

(SEAL)

[fol. 11]

IN UNITED STATES DISTRICT COURT

* * * *

MOTION FOR PRELIMINARY INJUNCTION—
Filed July 18, 1963

Comes now the plaintiff herein and respectfully moves this Court to grant a preliminary injunction restraining the defendant from issuing his Certificate approving and authorizing the establishment and operation by the First Security Bank of Utah, N. A., of a branch on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah.

In support of such motion plaintiff states to the Court as follows:

1. Plaintiff is filing, simultaneously with this motion, a Complaint for Declaratory Judgment and Injunctive Orders against defendant requesting—

(a) A determination that the establishment and operation by the First Security Bank of Utah, N. A., (a national banking association) of a branch bank at the location above described would be a violation of Title 12 United States Code, Section 36 (National Banking Act);

(b) Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation of such branch bank; and

(c) Such other and further relief as the facts and circumstances may require.

2. Plaintiff Commercial Security Bank, does now operate, and since July 30, 1925 has operated, a bank in Ogden, Utah, which bank was duly established under the laws of the State of Utah. In addition to its principal office it also operates a branch office in that city.

3. Title 12 United States Code, Section 36(c), authorizes the establishment and operation of branches by National Banks, with the approval of the Comptroller of the Currency, at locations where State banks are expressly permitted by State law to establish and operate branches. The law of the State of Utah prohibits the establishment and operation of branches of State banks in

a city or town in which is located any bank regularly transacting a banking business, with certain exceptions not here applicable relating to cities of the "first class." Utah Code Ann. Tit. 7, Chap. 3, Sect. 6. As the proposed location for the proposed branch of the First Securi- [fol. 12] ty Bank of Utah, N. A. is within the City of Ogden where there are presently three banks regularly transacting a banking business (Plaintiff, the Bank of Utah, and the Bank of Ben Lomand), the approval of the establishment of such branch by the defendant herein would be illegal.

4. Plaintiff further alleges, upon information and belief, that despite the prohibition of law described in paragraph 3 above, a field investigation by a National Bank Examiner of the application of the First Security Bank of Utah, N. A. for a branch has been completed, and that the said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank to the location described in its pending application, all in contravention of Title 12 United States Code, Section 36.

5. The issuance of the aforesaid Certificate by the defendant to the First Security Bank of Utah, N. A. would constitute conclusive legal authority of said bank to establish and operate its proposed branch at the location hereinbefore described, and such action could not be challenged by plaintiff in any subsequent proceeding. Therefore, the plaintiff has no adequate remedy at law.

6. Plaintiff further alleges that the issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The First Security Bank of Utah, N. A. is a much larger bank than is plaintiff. The location at which it proposes to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden. A substantial number of the customers, depositors, and borrowers of the plaintiff are located in the vicinity of the proposed branch. If the

First Security Bank of Utah, N. A., a bank many times larger than plaintiff, were allowed to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury of the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

WHEREFORE, plaintiff prays the Court to hear this Motion promptly and to issue its preliminary injunction restraining defendant from issuing his Certificate above [fol. 13] described pending the hearing and determination of the complaint herein filed.

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff
1001 Connecticut Avenue
Washington 6, D. C.
Telephone: EX 3-5333

NEIL R. OLMSTEAD
Ogden, Utah

Of Counsel

IN UNITED STATES DISTRICT COURT

* * * *

TEMPORARY RESTRAINING ORDER—Filed July 19, 1963

On consideration of the Motion for Temporary Restraining Order filed herein on this 18th day of July, 1963, and the Complaint filed herein on July 18, 1963, and the Motion for Preliminary Injunction filed on the same date, it appears to the Court:

That the defendant may issue to the First Security Bank of Utah, N. A. (a national banking association) a certificate approving and authorizing the establishment of a branch bank on Harrison Blvd. between 30th and

36th Streets, Ogden, Utah, before the return date for answering plaintiff's Motion for Preliminary Injunction and before hearing on plaintiff's Complant for a permanent restraining order against the defendant;

That the First Security Bank of Utah, N. A., upon issuance by defendant of his Certificate, will be authorized forthwith to establish and operate a branch bank at the location above-described during the pendency of plaintiff's Motion for Preliminary Injunction;

That plaintiff is now and for some years past has been operating banking offices in the City of Ogden, Utah, under the laws of the State of Utah, within which city defendant may approve and authorize a branch of the First Security Bank of Utah, N. A.;

[fol. 14] That the Complaint herein alleges that the issuance by the defendant of his Certificate to the said National Bank approving and authorizing its operation of a branch bank at the location therein described would constitute a violation of Title 12 United States Code, Section 36;

That after the issuance by defendant of his Certificate to First Security Bank of Utah, N. A., a restraining order against defendant will be of no avail;

And it further appearing to this Court that, because of the foregoing, plaintiff will suffer irreparable injury, loss or damage unless a temporary restraining order shall be granted, as prayed, it is by the Court this 19th day of July, 1963, at 10:00 o'clock A. M.,

ORDERED, that said defendant and his agents be, and he and they are hereby, restrained and enjoined from issuing to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

2. That the said plaintiff shall give security in the sum of $100.00 conditioned for the payment of such costs and damages as may be incurred or suffered by said defendant if he be found that he shall be wrongfully restrained hereby, and that since the corporate office of plaintiff is not in the District of Columbia, the personal bond of plaintiff's attorney, James F. Bell, 1001 Connec-

ticut Ave., Washington 6, D. C. may be substituted for such security required of plaintiff as aforesaid;

3. This restraining order shall expire on the 29 day of July, 1963, unless extended by order of this Court.

/s/ EDWARD M. CURRAN
Judge
District Court of the United States
for the District of Columbia
10:03 A.M.
July 19, 1963.

[fol. 15]

IN UNITED STATES DISTRICT COURT

* * * *

ORDER SETTING HEARING ON PRELIMINARY INJUNCTION—
Filed July 19, 1963

Ordered, that Plaintiff's Motion for Preliminary Injunction be and the same is hereby set for hearing on the 29th day of July, 1963, at 10 o'clock A.M. before the Motions Court.

/s/ EDWARD M. CURRAN
EDWARD M. CURRAN, Judge
District Court of the United States
for the District of Columbia

Signed: July 19, 1963

IN UNITED STATES DISTRICT COURT

* * * *

MOTION FOR POSTPONEMENT OF DATE FOR HEARING MOTION FOR PRELIMINARY INJUNCTION—
Filed July 26, 1963

Now comes plaintiff, with the consent of the defendant, to move this court for an order indefinitely postponing the date for hearing plaintiff's motion for preliminary injunction.

1. There is presently pending before this court for hearing plaintiff's motion for preliminary injunction to restrain the defendant from issuing a certificate of authority to the First Security Bank of Utah, N.A. for a branch in the City of Ogden, Utah, pending a hearing and determination on plaintiff's Complaint for Declaratory Judgment and Injunctive Orders. Both said motion and Complaint were filed on July 18, 1963.

2. Said motion for Preliminary Injunction has been set down for hearing by this court on July 29, 1963. On that date an Order of this court, entered July 19, 1963, will also expire temporarily restraining defendant from issuing a certificate of authority, as described above, pending a hearing on the motion for preliminary injunction.

[fol. 16] 3. The Department of Justice, attorneys for the defendant, has agreed with counsel for plaintiff that no certificate of authority in this matter will be issued by defendant until such time as (a) defendant notifies plaintiff's counsel of an intent to issue a certificate of authority to the First Security Bank of Utah, N.A. for a branch, and (b) plaintiff's motion for a preliminary injunction is thereafter heard by this court following a prompt request by counsel for plaintiff to have such motion heard. A copy of said stipulation is attached hereto as Exhibit A.

4. The aforesaid stipulation of counsel renders unnecessary either an immediate argument on plaintiff's motion for preliminary injunction or a continuance of the Temporary Restraining Order issued by this court on July 19, 1963.

WHEREFORE, and pursuant to the aforesaid stipulation of counsel, plaintiff prays this court for an order indefinitely postponing the hearing on plaintiff's motion for preliminary injunction.

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff
1001 Connecticut Avenue, N.W.
Washington 6, D. C.
Telephone: EX 3-5333

Consent:

/s/ R. DICKEY HAMILTON
R. DICKEY HAMILTON
Attorney for Defendant
Department of Justice
Washington 25, D. C.

IN UNITED STATES DISTRICT COURT

* * * *

STIPULATION—Filed July 26, 1963

It is hereby stipulated and agreed by and between the parties, Commerial Security Bank and James J. Saxon, Comptroller of the Currency, through their respective counsel:

[fol. 17] 1. That counsel for the Comptroller of the Currency will notify James F. Bell, Esq., Counsel for Commercial Security Bank of the Comptroller's intention to issue a certificate of authority to the First Security Bank of Utah, if, in fact, he decides to issue such a certificate.

2. That if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security Bank will apply to the Court for the earliest possible hearing on its pending motion for a preliminary injunction. Commer-

cial Security Bank agrees to apply for a hearing within four days of being so notified, unless counsel for the Comptroller of the Currency agrees to an additional time.

3. That the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction.

4. That Commercial Security Bank will file with the Court a motion to postpone indefinitely the date for hearing on its pending motion for a preliminary injunction.

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff

/s/ R. DICKEY HAMILTON
R. DICKEY HAMILTON
Attorney, Department of Justice
Attorney for Defendant

IN UNITED STATES DISTRICT COURT

* * * *

ORDER POSTPONING INDEFINITELY HEARING ON MOTION FOR PRELIMINARY INJUNCTION—July 26, 1963

It is Ordered, with consent of all parties, that the hearing on plaintiff's motion for preliminary injunction be and the same is hereby indefinitely postponed.

/s/ JOHN J. SIRICA
Judge
District Court of the United States for the District of Columbia

Dated: July 26, 1963

[fol. 18]

IN UNITED STATES DISTRICT COURT

* * * *

MOTION OF DEFENDANT, JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, TO DISMISS THE COMPLAINT—Filed June 26, 1964

Defendant, James J. Saxon, Comptroller of the Currency by his undersigned attorneys, moves the Court to enter an order dismissing the complaint upon the grounds that:

1. Plaintiff lacks standing to maintain this action, and
2. The complaint fails to state a claim upon which relief can be granted.

Attached hereto and in support of this motion is a memorandum of points and authorities.

/s/ JOHN W. DOUGLAS
JOHN W. DOUGLAS
Assistant Attorney General

/s/ HARLAND F. LEATHERS
HARLAND F. LEATHERS

/s/ R. DICKEY HAMILTON
R. DICKEY HAMILTON
Attorneys, Department of Justice
Attorneys for James J. Saxon,
Comptroller of the Currency

[CERTIFICATE OF SERVICE (omitted in Printing)]

[fol. 19]

IN UNITED STATES DISTRICT COURT

* * * *

CROSS MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT—Filed July 6, 1964

Comes now the Plaintiff, which opposes Defendant First Security Bank's motion for summary judgment, and moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor against Defendant Comptroller on the following grounds:

1. There is no genuine issue as to any of the material facts upon which Plaintiff relies in support of its cross motion, and
2. Plaintiff is entitled to summary judgment as a matter of law.

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff
Commercial Security Bank of Ogden
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

IN UNITED STATES DISTRICT COURT

* * * *

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL CIVIL RULE 9(h)—Filed July 6, 1964

Plaintiff, in support of its cross-motion for summary judgment herein, and pursuant to Rule 9(h) of the Local Rules of this Court, hereby sets forth a statement of the material facts in support to its cross-motion for summary

judgment and contends there is no genuine issue as to these facts so stated:

1. Plaintiff is a State bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It main- [fol. 20] tains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the authority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah. (Complaint, para. 2)

2. On June 25, 1963, the First Security Bank of Utah, N. A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Boulevard, between 30th and 36th Streets, in Ogden, Utah. (Complaint, para. 2; Memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 1)

3. The First Security Bank of Utah, N.A., is a national banking association chartered by the Comptroller of the Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office and one branch (Complaint, para. 4; Memorandum of Defendant First Security in Support of Motion for Summary Judgment, para. 2).

4. There are four banks transacting business in the City of Ogden, Utah. Plaintiff, Defendant First Security Bank of Utah, N.A., the Bank of Utah, and the Bank of Ben Lomand. (Complaint, para. 7)

5. The City of Ogden (1960 Pop. 70,197) is a city of the "second class", as such city is defined in Utah Code Ann. Title 10, Chap. 1, Sec. 1 (1953 as amended), having a population of more than 30,000 and less than 90,000 persons. (Complaint, para. 6)

6. On June 9, 1964, the Defendant Comptroller notified the Defendant First Security Bank of Utah that its branch application was approved, but he has not yet set a date for the issuance of the certificate of authority authorizing Defendant First Security to operate said branch.

7. On July 19, 1963, Judge Curran issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First Security. Prior to the expiration date of that order, counsel for Commercial Security and Comptroller filed a Stipulation with this Court by which it was agreed "that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction", and "that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security Bank will apply to the Court for the [fol. 21] earliest possible hearing on its pending motion for preliminary injunction". Notice has not been given pursuant to the Stipulation. (Stipulation between counsel for Commercial Security and Defendant Comptroller filed with this Court; memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 2.)

Respectfully submitted,

/s/ JAMES F. BELL
JAMES F. BELL
Attorney for Plaintiff
Commercial Security Bank of Ogden
1001 Connecticut Avenue, N.W.
Washington 6, D. C.

* * * *

AFFIDAVIT OF FRED A. BAKER—Filed July 6, 1964

STATE OF UTAH)
: ss
COUNTY OF WEBER)

FRED A. BAKER being first duly sworn on oath deposes and says: I am a Vice President of Commercial Security Bank, plaintiff above named, and make this affidavit for and on behalf of said plaintiff.

Attached hereto marked Exhibit "A" and made a part hereof is the original letter received by Commercial Security Bank addressed to Robert G. Hemingway as President thereof, dated June 30, 1964 from C. B. Quinn, Chief Examiner in the office of the Bank Commissioner of the State of Utah, together with the copy of the opinion of the Attorney General of Utah as appended thereto.

/s/ FRED A. BAKER

Subscribed and sworn to before me this 1st day of July, 1964.

/s/ NEIL R. OLMSTEAD
Notary Public
Residing at Ogden, Utah

My commission expires:
March 24, 1967

[fol. 22] EXHIBIT "A" TO AFFIDAVIT

THE STATE OF UTAH
OFFICE OF THE BANK COMMISSIONER
SALT LAKE CITY

SPENCER C. TAYLOR
Bank Commissioner

C. B. QUINN
Chief Examiner

June 30, 1964

MARGARET MOZLEY
Executive Secretary

Mr. Robert G. Hemingway, President
Commercial Security Bank
Ogden, Utah

Dear Mr. Hemingway:

We are enclosing a copy of an opinion by A. Pratt Kesler, Attorney General, as to whether or not the law prohibits the establishment of a branch of a state chartered bank in the City of Ogden.

Very truly yours,

/s/ C. B. QUINN
Chief Examiner

CBQ:mm
Enclosure

OFFICE OF THE ATTORNEY GENERAL
STATE CAPITOL
SALT LAKE CIY, UTAH

June 30, 1964

Mr. Spencer C. Taylor
Bank Commissioner
Building

Dear Mr. Taylor:

I am writing in response to your request for an informal opinion as to whether or not Utah State law prohibits the establishment of a branch of a State chartered bank in the City of Ogden, Utah, and whether or not the establishment of a branch in said City by a national bank is permissible. While I am not entirely familiar with the [fol. 23] banking situation in Ogden, I do know that there are several unit banks located within the City limits.

Without reciting the applicable statutes, I direct your attention to the recent decision of the Utah Supreme Court in Walker Bank and Trust Company v. Spencer C. Taylor, Bank Commissioner of the State of Utah, and State Bank of Provo, 390 P. 2d 592. This case, with which you are familiar, dealt with a fact situation quite analogous to that in Ogden, and it is my opinion that the court's interpretation of the law would prohibit the establishment by a State chartered bank of a branch bank in Ogden.

It is also my opinion that a national bank is prohibited from establishing a branch bank in Ogden, because such branches may be established only in conformity with State law.

The pertinent portions of Title 12, Section 36, U.S.C.A., provide:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State

banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

For your convenience I am attaching a copy of the advance sheet of the court decision in the above case.

Sincerely,

A. PRATT KESLER
Attorney General

HWV/ej
Enc.

[fol. 24]

IN UNITED STATES DISTRICT COURT

* * * *

MEMORANDUM & ORDER—Filed December 18, 1964

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the

"second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18, 1963, the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U.S.C.A. § 36, and an injunction to restrain the Comptroller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, On July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

> ". . . that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction . . . that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of [fol. 25] the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction."

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit.

The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its business and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company*, 323 F. 2d 290, 300 (C. A. D. C., 1963), cert. granted 376 U.S. 948:

> "The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D. C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra*, at page 300, the Court stated, ". . . there is no discretion to unlawfully issue a certificate.", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

[fol. 26] The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U. S. C. § 36(c) (1927, as amended), which provides:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;* . . .". [emphasis supplied].

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.*" [emphasis supplied].

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would [fol. 27] clearly have been denied.[1] The question before

[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co.* v. *Taylor*, 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

this Court, therefore, has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

The defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was ". . . the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as applied to the establishment of state bank branches." (at page 775). Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, recently held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defendant national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish [fol. 28] a new branch. The *Commercial Bank of Roseville* case, *supra,* as well as other cases emphasizing the control-

ling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels impelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21-213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had

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[2] 12 U. S. C. A. §§ 36(c), 51, 85, 92a(a), and 214c.

no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states [fol. 29] at that time did allow branching, however, and as a result, the competitive situation was so imbalanced that the Comptroller in his 1924 report (Government Printing Office), stated, at page 4:

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system."

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c) (1933, as amended) set out below:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks . . .".

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra*, that it is bound to hold that the exact standards of the Utah branching law must be applied to the First Security Bank of Utah, N. A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If [fol. 30] the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (e) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Currency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets, Ogden, Utah, would constitute a violation of 12 U. S. C. A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

ORDERED, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

ORDERED, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

ORDERED, that the Motion for Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

IT IS FURTHER ORDERED, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N. A., which is the subject matter of this cause of action.

/s/ LEONARD P. WALSH
LEONARD P. WALSH, JUDGE

[fol. 31]

IN UNITED STATES DISTRICT COURT

* * * *

NOTICE OF APPEAL—Filed February 15, 1965

Notice is hereby given this 15 day of February, 1965, that defendant, James J. Saxon, Comptroller of the Currency hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in favor of Commercial Security Bank and against the defendant, James J. Saxon, Comptroller of the Currency.

/s/ RICHARD S. BEATTY
Attorney for
Def., James J. Saxon

IN UNITED STATES DISTRICT COURT

* * * *

ORDER EXTENDING TIME TO DOCKET APPEAL—Filed March 17, 1965

Pursuant to the provisions of Rule 73(g) of the Federal Rules of Civil Procedure, it is this 17th day of March, 1965,

ORDERED, that the Defendant James J. Saxon's time for filing and docketing the record on appeal with the United States Court of Appeals for the District of Columbia Circuit is hereby extended fifty (50) days, to and including May 13, 1965.

/s/ LEONARD P. WALSH
Judge

[CERTIFICATE OF SERVICE Omitted in Printing]

[fol. 32]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

Civil 1815-63

* * * *

No. 19,356

FIRST SECURITY BANK OF UTAH, N. A., APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

No. 19,357

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Wright and Tamm, Circuit Judges.

JUDGMENT—Nov. 18, 1965

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed. *Walker Bank & Trust Company* v. *James J. Saxon, Comp-*

troller of the Currency, et al., decided October 26, 1965, No. 7981, C.C.A. Tenth Circuit.

It is further ORDERED by the court that all parties bear their own costs on these appeals.

Per Curiam.

Dated: Nov. 18 1965

[fol. 34]

[Clerk's Certificate to foregoing Transcript Omitted in Printing.]

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1965

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

vs

COMMERCIAL SECURITY BANK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 16, 1966

/s/ Abe Fortas
Associate Justice of the Supreme Court of the United States

Dated this 16th day of February, 1966

[fol. 36]

SUPREME COURT OF THE UNITED STATES

No. 1126, October Term, 1965

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 875 and 1009 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 219252 849

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1. *The decision of the Court of Appeals in declining to dismiss because of lack of jurisdiction is in conflict with two decisions of The Supreme Court of the United States.* 10

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Michigan National Bank v. Robertson (1963) 372 U. S. 591 18

Mercantile National Bank v. Langdeau (1963) 371 U. S. 555 18

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2. *The decision of the Court of Appeals for the Tenth Circuit in holding that National banks are subject to the identical restrictions of state laws as state banks in establishing branches within the limits of their own community is in conflict with the decision of the Court of Appeals for the Fourth Circuit in holding that National banks are not subject to the same restrictions of state law as state banks. The decision also decided an important question of Federal branch banking law which has not been, but should be settled by The Supreme Court* 19

First National Bank of Smithfield, North Carolina v. Saxon (No. 9795, 9796) 352 F. 2d 267 20

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IN THE SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, A National Banking Association,
Petitioner

vs.

WALKER BANK & TRUST CO., a corporation,
Respondent

October Term 1965

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The First National Bank of Logan, Utah, petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered October 26, 1965, in the above case of Walker Bank & Trust Company, a corporation, v. James J. Saxon, Comptroller of the Currency and The First National Bank of Logan, Utah, a National Banking Association, No. 7981. The First National Bank's motion for rehearing on the grounds that the District Court lacked jurisdiction was denied on December 3, 1965.

OPINION BELOW

The opinion of the District Court for Northern District of Utah is reported at 234 F. Supp. 74.

The opinion of the Court of Appeals for the Tenth Circuit is reported at .....352 F. 2d 90.....

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit in the above case was made and entered on October 26, 1965. The First National Bank's petition for rehearing was denied on December 3, 1965.

The jurisdiction of The Supreme Court of the United States is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

Respondent, Walker Bank and Trust Company, of Salt Lake City, Utah, brought action to have the Certificate of Authority granted by the Comptroller of the Currency to The First National Bank of Logan to operate a branch in Logan, Utah, declared illegal because it did not comply with requirements of Utah law which Walker Bank alleged was required by 12 U. S. C. Section 36 (c) and to enjoin The First National Bank of Logan, Utah, from continuing to operate its branch. Walker Bank alleged it would be irreparably injured and damaged in excess of $10,000 if the injunction was not issued, which

allegations were denied by the defendants. Walker Bank presented no evidence to the District Court that it had been or would be damaged by the continued operation of the branch. The District Court nevertheless denied The First National Bank's motion to dismiss based on lack of jurisdiction, there being no showing that the amount in controversy exceeded $10,000, but the District Court did dismiss the Complaint of Walker Bank on the grounds that the Comptroller was within his statutory authority in authorizing the branch. On appeal to The Court of Appeals for the Tenth Circuit, the decision of the District Court was reversed on the merits but was silent as to the question of jurisdiction raised by The First National Bank. The questions presented are:

1. *Does a Federal District Court have jurisdiction to hear a complaint by a state bank that a National bank's intra-city branch was illegally established and asking that its continued operation be enjoined where there was no showing that the amount in controversy exceeded $10,000 as the state bank presented no evidence that there was or would be damage to the state bank's business by the continued operation of the National bank's branch, and the defendant National bank's pleading denied that the state bank would be damaged?*

If this question is answered in the negative the second question need not be answered. If it is answered in the affirmative then the following question remains:

2. *Whether Congress in the National Banking Act, 12 U. S. C. Section 36 (c) intended that National Banks*

are subject to the identical restrictions of state law as state banks in establishing a branch within the limits of their own community?

STATUTES AND FEDERAL RULES INVOLVED

Question No. 1:

United States Code, Title 28:

Section 1331 (p. 5019), 72 Stat. 415:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Rules of Civil Procedure, Rule 12 (h) (p. 5138):

(2) that, wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Question No. 2:

United States Code, Title 12:

Section 36 (p. 2068), 76 Stat. 667:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches; (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at

the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

STATEMENT OF THE CASE

Petitioner First National Bank of 99 North Main Street, Logan, Utah, applied to the Comptroller of the Currency for permission to establish a branch at 466 North Main Street in Logan, Utah, on November 9, 1962. Prior to that time The First National Bank had no branch. The Respondent, Walker Bank & Trust Company of Salt Lake City, Utah, a State bank, and The First Security Bank of Utah, of Ogden, Utah, a National bank (not a party to this proceeding) were at the time and are now operating branches in Logan, Utah.

The Comptroller requested John Wanless, Jr. a National Bank Examiner to investigate The First National Bank's application and in the course of his investigation between November 27 and 29, 1962 he advised Reed Holt, President of Walker Bank, of the application. But Walker Bank took no action thereon. The Comptroller approved the application and on January 21, 1963 issued his certificate of authority granting permission to The First National Bank to establish a branch bank on North Main Street in Logan, Utah. On the same day The First National Bank established a branch and it has continued to operate since that time.

On July 9, 1963, Plaintiff Walker Bank, commenced this action and asked for a judgment declaring that the authorization of the Comptroller for the branch was prohibited by Title 12, United States Code, Section 36 (c) and for an order compelling the Comptroller to rescind the certificate and restraining the defendant bank from

establishing or operating a branch bank in the city of Logan on the grounds that even though Utah State law expressly authorizes branch banking the defendant National bank must also comply with the portions of Utah law requiring a bank seeking to branch to take over another unit bank where one is located in the city *even though there was no other unit bank in Logan which The First National Bank could take over.*

Walker Bank alleged in its complaint the basis for jurisdiction of the Federal District Court as required by Rule 8 (a) (1) of the Federal Rules of Civil Procedure, Title 28, United States Code as follows:

> "This action arises under Section 36 of Title 12 of the United States Code commonly referred to as the National Banking Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah and in the said City of Logan where it has a large investment in capital, property, equipment and good will and irreparable damage will be sustained by plaintiff unless the relief herein prayed for is granted. The amount in controversy exceeds, exclusive of interest and costs the sum of $10,000."

Defendant First National Bank of Logan denied the allegation above set forth in paragraphs 1 and 7 of its third defense and in said paragraph 1 not only denied that Walker Bank would be damaged but alleged that it would be benefitted by Defendant's branch:

> "This defendant denies that irreparable damage will be sustained by plaintiff unless said relief is granted and alleges that no damage will be sustained by plain-

tiff, in fact, under a National Emergency plaintiff may be benefitted by the establishment of a new branch bank of this defendant as authorized by the Comptroller of Currency."

On April 24, 1964, the parties entered into a stipulation of facts and other matters which contained no fact showing that Walker Bank has been or would be damaged by The First National Bank's branch. The parties did agree as follows:

> "6. At the time of the commencement of this action: Plaintiff had demand and time deposits at its Cache Valley Branch in Logan, amounting to in excess of $5,000,000 which has been made at said Cache Valley Branch; and it has an investment in furniture, fixtures and leasehold improvements at the Cache Valley Branch in excess of $50,000."

The parties also agreed that:

> ". . each of the parties hereto reserves the right to offer evidence at the trial of this case with respect to any issue of fact under the pleadings in this case which has not been resolved by the stipuation of facts hereinabove set forth, provided that:
>
> (a) The party intending to offer such evidence shall give written notice thereof to the other parties within thirty days from the date hereof . "

Walker Bank gave no notice that it intended to offer any additional evidence at any time prior to trial and offered no evidence at trial. The First National Bank gave notice that it intended to offer evidence and thereafter the parties stipulated as to such evidence. In the

second stipulation dated June 18, 1964, the parties stipulated that if Ronald S. Hansen were called to testify he would show that The First National Bank was agent for the Federal Reserve Bank to act for it in the event of emergency and the branch bank would contain a large safe to permit The First National Bank to have the additional vault space necessary to act as such agent thus relieving the Walker Bank of the necessity of storing additional cash and currency in the event of a national emergency.

On June 30, 1964, the parties stipulated that:

> "The case is hereby submitted to the court for its decision on the merits upon the facts stipulated to by the parties and set forth in the Stipulation of Facts and other matters, dated April 24, 1964 and filed herein, and the Stipulation between plaintiff and the defendant, The First National Bank of Logan, dated June 18, 1962, and filed herein . "

At the hearing before the trial court on September 15, 1964, the defendant First National Bank moved to dismiss on the grounds of lack of jurisdiction which motion was denied without opinion by the District Court. In its Memorandum Decision of September 30, 1964, and in its Judgment of October 9, 1964, the trial court makes no finding of facts relating to jurisdiction and makes no conclusions that it has jurisdiction. The District Court said that since Utah State law expressly authorized a branch bank in Logan, Utah, The First National Bank was not required by the Federal law to comply with the State's procedural requirement of taking over another unit bank (since there was no unit bank The First National Bank

could have taken over.) The District Court dismissed the Plaintiff's complaint.

Walker Bank appealed the decision. The First National Bank did not cross-appeal but in its brief suggested (as provided in Federal Rules of Civil Procedure, Rule 12 (h) (2), 28 United States Code) that the United States Court of Appeals should sustain the dismissal of the complaint on the grounds that the District Court lacked jurisdiction because the amount in controversy alleged by the plaintiff had not been proved. On October 26, 1965, the United States Court of Appeals Tenth Circuit, entered its decision reversing the District Court and holding that The First National Bank must comply with all provisions of state law before it can branch and the case was remanded to the District Court for a decision on The First National Bank's affirmative defenses relating to standing to sue, laches, and constitutionality of the Utah Statute. The decision of the Court of Appeals was silent as to whether the District Court was correct in denying the motion to dismiss on the grounds of lack of jurisdiction and there is nothing in the decision which specifically finds that the District Court had jurisdiction or whether the facts as stipulated by the parties show an amount in controversy in excess of $10,000. The First National Bank petitioned for a rehearing on the grounds of lack of jurisdiction which petition was denied without opinion on December 3, 1965.

REASONS FOR GRANTING WRIT

The decision of the United States Court of Appeals, Tenth Circuit, should be reviewed because:

1. *The decision of the Court of Appeals in declining to dismiss because of lack of jurisdiction is in conflict with two decisions of The Supreme Court of the United States.*

The first case of KVOS v. Associated Press (1936) 299 U. S. 269, 81 L.ed 183, 57 S. Ct. 197 involved an action by the Associated Press against a radio station to enjoin it from pirating news broadcast items gathered by the Associated Press and distributed to its members. The complaint alleged:

> " . the damage to which complainant is being subjected . . is in excess of the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum . .
>
> " . . and the continuance by (KVOS) of its practice will increasingly cause irreparable injury and damage to the (Associated Press) because the effort and expenditures to gather and obtain news will be rendered largely without reward or value so far as concerns the territory served by petitioner's station."

It will be noted that the allegations of Associated Press go further than the allegations of Walker Bank and give a reason for the irreparable damage while Walker Bank merely alleged the jurisdictional amount and irreparable injury.

KVOS filed a motion to dismiss on the grounds that "complainant has not lost any amount and never will lose any amount by reason of this controversy" which is virtually identical with The First National Bank's defense

that the Walker Bank has not been and will not be damaged by its branch. But The First National Bank went further and alleged that its branch may even be a benefit to Walker Bank.

The Supreme Court said the District Court found:

> " . the amount in controversy herein, by reason of the defendant's motion to dismiss, must be construed to be in excess of $3000.00 exclusive of interest and costs (and) found the facts as to the business and conduct of the parties substantially as alleged in the complaint . "

And as conclusions of law:

> " . that (the court) had jurisdiction of the parties and the subject matter . . (that) the acts of (KVOS) did not amount to unfair competition . and did not violate their property rights . "

The District Court dismissed the complaint on the merits.

The District Court here also denied the defendants' motion to dismiss on grounds of lack of jurisdiction and since it did not make any findings that Walker Bank had been or would be damaged by defendant's branch, the Court must have construed the defendant's motion as requiring it to conclude that the amount in controversy must be over the jurisdictional amount as did the District Court in the KVOS case. The District Court also found on the merits as did the District Court in the KVOS case that no injunction should issue.

In the KVOS case the Circuit Court of Appeals

reversed the District Court. In dealing with the question of jurisdiction the Circuit Court said:

> "The several millions of dollars here alleged to be invested in the Association's business may well be damaged to the extent of $3,000.00 by the pirating practices described."

The assumption that the Associated Press may be damaged because of its large investment was rejected by the United States Supreme Court when it said:

> " . . we hold that in the circumstances the respondent (plaintiff, Associated Press) had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it .
>
> " . The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars . .
>
> " . But where the allegeations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof . .
>
> " . Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a

mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill.

"The Circuit Court of Appeals sustained the District Court's jurisdiction on the grounds that the finding upon that point (jurisdiction) was not without support, and the appellate tribunal could not say it was wrong, in view of the magnitude of the respondent's operations and expenditures . . these factors are irrevelant upon the issue of the value of the right for which protection is here sought."

Here Walker Bank had the burden of showing the case was within the District Court's jurisdiction and failed to sustain it. Even though it is not alleged (which makes this case even weaker than the argument used by Associated Press in the KVOS case) we assume that the right for which Walker Bank's suit seeks protection is that it should be free to conduct its branch operations in Logan without interference by The First National Bank's branch. But as in the KVOS case no facts are pleaded or proved which show the value of that right. The general allegations of damage and injury were challenged by The First National Bank in its answer. The United States Supreme Court said that in such case the plaintiff must support them by competent proof. Even though Walker Bank did not allege it would lose customers and business if The First National Bank's branch continued operations, if we assume that it intended such allegation to be included

in its 'irreparable injury" allegation, the Supreme Court says that this is insufficient because "no intimation is given of the character or extent of the damage they would suffer by such withdrawal" or loss of customers. Walker Bank said it had a large investment and does a large business in Logan, but the United States Supreme Court held that these matters are "irrevalent upon the issue of the value of the right for which protection is here sought."

Walker Bank offered no evidence of present or future damage. In such case the Supreme Court held in the KVOS case:

> "Since the allegation as to amount in controversy was challenged in an appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed."

The second case of McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 80 L. ed. 1135, 56 S. Ct. 780, involved an action by General Motors to enjoin the enforcement of a statute dealing with installment sales. The District Court granted an injunction and the case went to The United States Supreme Court on direct appeal. The Court said:

> "The question arises whether the matter in controversy exceeds the sum or value of $3,000 . . so as to give the District Court jurisdiction . The complaint alleged that the requisite amount was involved and this allegation was denied by the answer."

The identical situation is involved here where Walker Bank's allegation was denied by the defendants.

"Respondent points to the allegations of its bill that the net worth of its business exceeds $50,000; that it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000 . "

Here it was stipulated that Walker Bank has an investment in Logan in excess of $50,000 in buildings and fixtures and that it has outstanding loans of $5,000,000. The facts are almost identical as to jurisdiction.

The Supreme Court said:

"Respondent invokes the principal that jurisdiction is to be tested by the value of the object or right to be protected against interference. But in the instant case the statute does not attempt to prevent respondent from conducting its business."

The authorization to The First National Bank to operate a branch does not attempt to prevent Walker Bank from conducting its business.

"The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against interference is that right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to

jurisdictional amount save the general allegation that the matter in controversy exceeds $3000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Here the value of Walker Bank's business is not involved save to the extent that it may be affected by the operation of defendant bank's branch. The value of that right may be measured by the loss, if any that follows from defendant's branch operation. The allegations of Walker Bank's complaint throw no light upon that subject. There are no facts alleged showing what, if any, curtailment of business and consequent loss the operation of defendant's branch would involve. The complaint is thus destitute of any appropriate allegation as to jurisdictional amount, save the general allegation as to jurisdictional amount. That allegation was put in issue by defendant's answer and the record discloses neither finding nor evidence to sustain it.

In holding that the Plaintiff has the responsibility of pleading and proving the facts necessary to give the District Court jurisdiction the Court said:

"The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must

support them by competent proof. And where they are not so challenged the court may still insist that jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand the party alleging jurisdiction justify his allegations by a preponderance of evidence."

Walker Bank having failed to prove any present or future damage by reason of the operation of defendant's branch and the allegations of the jurisdictional amount having been denied the conclusion of this case should be as stated by the Supreme Court:

"Here the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegations of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed on that ground."

In the past, as indicated in the aforementioned cases, The Supreme Court has zealously guarded against the lower courts extending their jurisdiction beyond that granted by Congress. And recently The Supreme Court sustained Congressional enactments which protect National Banks from being sued by any one at any place in any court. (See Michigan National Bank v. Robertson (1963) 372 U. S. 591, 9 L. ed. 2d 961, 83 S. Ct. 914, and Mercantile National Bank v. Langdeau (1963) 371 U. S. 555, 9 L. ed 2d 523, 83 S. Ct. 520.)

It is respectfully submitted that jurisdictional questions should be equally as important as questions of venue

and that if a Federal District Court can permit a suit against a National Bank by a state bank regardless of whether the complainant shows an amount in controversy in excess of $10,000, it is time for The Supreme Court to clarify the rule with regard to jurisdiction of Federal Courts over suits against National Banks or the Congressional enactments with respect thereto will be meaningless. If a Federal District Court can ignore the amount in controversy limitation imposed by Congress where a National Bank is involved, then the question can be ignored in any suit brought in Federal Court. If Federal Courts can waive jurisdictional requirements whenever desired, then litigants no longer have equal opportunity to invoke the jurisdiction of Federal Courts, but their rights depend on human desires and not on due process of law.

2. *The decision of the Court of Appeals for the Tenth Circuit in holding that National banks are subject to the identical restrictions of state laws as state banks in establishing branches within the limits of their own community is in conflict with the decision of the Court of Appeals for the Fourth Circuit in holding that National banks are not subject to the same restrictions of state law as state banks. The decision also decided an important question of Federal branch banking law which has not been, but should be settled by the Supreme Court.*

The Court of Appeals for the Tenth Circuit asked this question in this case (see Appendix II, pages 32, 33):

"Does 12 U. S. C. Section 36 (c) (1) require the Comptroller to withhold his certificate of approval for

the establishment of a national bank branch unless the branch is authorized in all respects by the law of the State in which the bank is located?"

The Court then answered the question in the affirmative and later in the decision said (see Appendix II, page 38):

> "We believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it."

In First National Bank of Smithfield, North Carolina vs. Saxon, (decided October 21, 1965 No. 9795, 9796), the Court of Appeals for the Fourth Circuit said in ruling on the law a National bank must follow in obtaining a branch in Smithfield, North Carolina:

> "Protestant Smithfield Bank also contends that the Comptroller's approval is contingent upon his compliance with the inquiries and ascertainments required of the State Commissioner of Banks by the North Carolina statute . . We disagree with that argument."

So in the Tenth Circuit a National Bank must show the Comptroller that it has complied with all provisions of state law before it can have a branch, but a National Bank in the Fourth Circuit must only show that state banks are authorized to have branches and then rely upon the Comptroller to determine whether the economic factors justify a branch. In the Tenth Circuit the Comptroller cannot authorize a branch by a National bank even though he finds economic factors from the point of view of the Federal Government require a branch and even

though State law expressly authorizes a branch, if the National bank fails to show compliance with some economic or procedural requirement of State law.

Because the rapidly expanding economy of the country requires additional banks and branches to satisfy the demands of business, the conflict between the Circuit Courts will result in considerable litigation and uncertainity as to legality of banks and branches unless the question is settled at this time by The Supreme Court. (See also recent ruling of Judge Fox in American Bank and Trust Company v. Saxon and Dart National Bank, Mich. West District ..... F. Supp. .....).

At the present time there are thirty-four states which permit branch banking subject to certain state statutory restrictions (see Appendix I). These states have statutes which expressly authorize branch banking by state banks but in addition impose economic and procedural limitations such as:

1. Approval by the State Banking Commissioner.
2. Finding by the State Banking Commissioner on questions of:
   a. If financial history and general condition of applicant bank and future earnings prospect warrant establishment of branch.
   b. Economic needs and convenience of community to be served.
   c. Probable volume of business in such community.

3. Capitalization requirements.

4. Existence of other banks in community.

5. Existence of one unit bank in community as barring that unit bank from branching.

In writing subsection (c) of Title 12, Section 36, United States Code, Congress did not specifically impose any state restrictions on the establishment of National bank branches located within the same city limits as the parent bank, but Congress specifically made establishment of National bank branches outside the city limits where the main bank is located subject to location restrictions of state law and subject to capitalization restrictions of state law. The Court of Appeals for the Tenth Circuit said that notwithstanding the lack of specific restrictions mentioned by Congress, National banks are nevertheless subject to all restrictions of state law in establishing branches within their own community. In states following the decision of the Tenth Circuit, the Comptroller of the Currency will be restricted by state procedural laws in his efforts to permit branches to meet the banking needs of the nation. But in states following the decision of the Fourth Circuit, the Comptroller will not be limited by state procedural requirements in authorizing branches in accordance with the economic needs of the nation. The conflict in decisions seems destined to result in further litigation unless the question is resolved by The Supreme Court.

The holding of the Tenth Circuit Court of Appeals raises a serious question as to whether National Banks

under jurisdiction of Courts following the language of its opinion should in their own interest convert to state banks. If a National bank must comply with all the requirements of state law before it can have a branch, then the National bank apparently must go through a hearing (as required by state statutes) to satisfy the State Banking Commissioner that a branch is required and then submit to a second examination by the Comptroller of the Currency as to whether there is a need for a branch and whether the applying bank can fill that need. Pending completion of the examination by the Comptroller, a state bank competitor can use the findings of the State Banking Commissioner as authority to establish a new branch in the area planned by the National bank and as a result the Comptroller may be forced to reject the National bank's application. In any event the inconvenience of having to meet the requirements of two hearing commissioners would probably offset any other advantages in remaining a part of the National banking system. If a large number of National banks converted to state banks in the thirty-four states affected, the result would have a serious effect on the ability of the Congress to provide for the currency and banking needs of the nation.

This Court has held on many occasions that the states cannot frustrate the purposes of National banks or impair their efficiency and the actions of the Comptroller of the Currency are subject to state restrictions only when, and only to the extent that Congress has stipulated. Mercantile National Bank v. C. H. Langdeau, (1963) supra.; Van Reed v. Peoples' Nat. Bank of Lebanon (1905) 198 U. S. 554, 25 S. Ct. 775, 49 L. ed. 1161; Davis v. Elmira

Savings Bank (1896) 161 U. S. 275, 16 S. Ct. 502, 40 L. ed. 700; Franklin National Bank v. New York (1954) 347 U. S. 373, 74 S. Ct. 550, 98 L. ed. 767; and First National Bank in St. Louis v. Missouri (1924) 263 U. S. 640, 44 S. Ct. 213, 68 L. ed. 486. In order that the efficiency of National banks will not be impaired by the conflict in decisions which leaves the legality of established branches in question, and the legality of proposed branches and the methods of obtaining approval of the same in doubt, it is respectfully requested that The Supreme Court grant a writ of certiorari so that the intent of Congress in enacting the branch banking law will be clarified.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Logan, Utah
Attorney for Petitioner
The First National Bank of Logan

Of Counsel
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APPENDIX I

Summary of Branch Banking Statutes of the 34 States permitting Branch Banking.

Alabama

Acts of 1953, 1955, 1957; Code of Alabama, Title 5, Sec. 125(1).

Alaska

Alaska Statutes, 1962, Sec. 06.05.415.

Arizona

Arizona Revised Stat. Anno., Sec. 6-223 (1956).

California

Calif. Financial Code Anno., Sec. 500 (1955).

Connecticut

Gen. Stat. of Conn., Revision of 1958, Sec. 36-59.

Delaware

2 Del. Code Anno., Title 5, Sec. 770 (Supp. 1962).

Georgia

Code of Ga. Anno., Sec. 13-203-1.

Hawaii

Revised Laws of Hawaii, C. 178, Sec. 39.

Idaho

Idaho Code, Sec. 26-1001 (Supp. 1963).

Indiana

5 Burns Ind. Stat. Anno., Sec. 18-1707.

Kentucky

Ky. Revised Stat., Sec. 287.180.

Louisiana

La. Revised Stat., Sec. 6:54 (1951).

Maine

Revised Stat. of Maine, Ch. 59, Sec. 19-C (1963 Supp); Ch. 59, Sec. 124 (1963 Supp.).

Maryland

Anno. Code of Md. 1957, Art. 11, Sec. 65.

Massachusetts

Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1963 Supp.); Ch. 172 A, Sec. 12.

Michigan

Mich. Stat. Anno., Secs. 23.762, 23762(1).

Mississippi

Miss. Code, Secs. 5228, 5229.

Nevada

Nevada Revised Stat., Sec. 660.010 (1960).

New Hampshire

N. H. Rev. Stat. Anno., Sec. 384-B:2 (1963 Supp.).

New Jersey

N. J. Stat. Anno., Sec. 17:9A-19.

New Mexico

N. M. Stat. Anno., Sec. 48-2-17.

New York

Book 4, Banking Law, Sec. 105.

North Carolina

Gen. Stat. of N. C., Sec. 53-62 (Supp. 1963).

Ohio

Page's Ohio Revised Code Anno., Title 11, Sec. 1103.09.

Oregon

Oregon Rev. Stat., Sec. 714.050.

Pennsylvania

Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1.

Rhode Island

Gen. Laws of R. I., Sec. 19-1-13 (1956).

South Carolina

Code of Laws of S. C., Sec. 8-57 (1962).

South Dakota

S. D. Code of 1939, Sec. 6.0402.

Tennessee

Tenn. Code Anno., Sec. 45-211.

Utah

Utah Code Anno., Sec. 7-3-6 (Supp. 1963).

Vermont

Vermont Stat. Anno., Title 8, Sec. 501 (1958).

Virginia

Code of Va., Title 6, Art 3, Sec. 6-26.

Washington

Revised Code of Wash. Anno., Sec. 30.40.020 (1961).

APPENDIX II

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1965

WALKER BANK & TRUST COMPANY, a corporation,

Appellant,

vs.

JAMES J. SAXON, Comptroller of the Currency; and THE FIRST NATIONAL BANK OF LOGAN, of Logan, Utah, a National banking association,

Appellees.

} Number 7981

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Joseph S. Jones (C. E. Henderson and Ray, Rawlins, Jones & Henderson on the brief) for Appellant;

David L. Rose, Attorney, Dept. of Justice, (John W. Douglas, Ass't. Attorney General, William T. Thurman, U. S. Attorney and Kathryn H. Baldwin, Attorney, Dept. of Justice on the brief) for Appellee James J. Saxon, Comptroller of the Currency.

Ted S. Perry of Perry & Perry for Appellee, The First National Bank;

Brief filed by James F. Bell for Amicus Curiae.[1]

[1] Leave was granted to the National Association of Supervisors of State Banks to file a brief in the case as amicus curiae.

Before PHILLIPS, PICKETT and HILL, United States Circuit Judges.

Hill, Circuit Judge.

Appellant, Walker Bank and Trust Company, brought this action in the court below against appellees, the Comptroller of the Currency and The First National Bank of Logan, to obtain a declaratory judgment decreeing the action of the Comptroller, in authorizing The First National Bank of Logan to establish and operate a branch bank in Logan, to be void and of no legal effect.

Both defendants, by separate answers, alleged the validity of the questioned action of the Comptroller and the defendant bank, in addition, raised the affirmative defenses of (1) lack of standing to sue on the part of the plaintiff, (2) estoppel, and (3) that the Utah statute governing the establishment of branch banks is unconstitutional. The trial court, by memorandum opinion, held that the action of the Comptroller was valid and therefore found it unnecessary to pass on any of the affirmative defenses raised. Appellant appealed from that decision.

The facts pertinent to this appeal may be briefly stated. Appellant is a banking corporation organized under the laws of Utah, with its main bank located in Salt Lake City and with a branch bank in Logan. Appellee, The First National Bank of Logan, is a banking corporation organized under the National Banking Act maintaining its principal bank in Logan, a city of the second class. On January 21, 1963, the appellee, Comptroller of the Currency, after application, issued a certificate to

The First National Bank of Logan, authorizing it to establish and maintain a new and separate branch bank in Logan in addition to its main bank. Our sole question pertains to the authority of the Comptroller to issue such a certificate.

We must first look to the Federal and State statutes pertinent to our question. The beginning point is 12 U.S.C. § 36(c), as amended, part of which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; • • • •"

(c) (2) of § 36 is set forth below[2] and covers specifically socalled "outside branches," that is branches outside the city of the parent bank. Since our facts disclose that we are only concerned with (c) (1) or "inside branches," that is a branch bank located within the same city or town as the parent, we need not pass on (c) (2). Con-

[2] 12 U.S.C. § 36(c) (2) provides in pertinent part:

"A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. • • • "

sideration of it in this case will be confined primarily to whatever light it might shed on (c) (1).

The Utah Code Ann., Title 7, Chap. 3, § 6 (1953 as amended) provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The parties stipulated that Logan, Utah, is not a city of the first class. Therefore, it is perfectly clear that in Logan, a state bank could not establish a branch bank unless it took over an existing bank which had been in operation for five previous years. The Supreme Court of Utah in Walker Bank & Trust Co. v. Taylor, 15 Utah 2d 234, 390 P.2d 592 (1964) in construing this Utah statute in regard to Provo, Utah, which like Logan is a city of the second class, held that the only way a branch state bank could be established in a city of less than the first class having an existing unit bank is by taking over such existing bank. The obvious question then to decide is this: Does 12 U.S.C. § 36(c) (1) require the Comptroller to withhold his certificate of approval for the

establishment of a national bank branch unless the branch is authorized in all respects by the law of the State in which the bank is located? The court below answered this question in the negative resting its opinion on the premise that § 36(c) (1) embodies only the requirement that inside branching be "expressly authorized" to State banks by the State law without other conditions or restrictions of State law. In other words, even though a state bank in an identical situation with that presented here could not establish a branch bank, nevertheless a national bank could because state law generally sanctions branch banking. For the reasons hereinafter stated, we disagree with the trial court and hold that 12 U.S.C. § 36(c) (1) provides, as Congress intended it should, that the measuring stick of national branch banks is state law.

The history of national bank legislation spans over one hundred years. The present Act was derived from the Act of June 3, 1864, 13 Stat. 99, which was the National Bank Act. During this period, a multitude of changes in the Act have occurred as various economic problems were encountered. The provisions of the Act affecting branch banking entered the scene in 1927. Before that time branch banking was not generally sanctioned by Congress. See First National Bank v. Missouri, 263 U.S. 640. The Court there noted that the various state laws are binding on the dealings and contracts of national banks unless and until those laws conflict with federal laws or frustrate the purpose for which national banks were created or impair their efficiency. With national banks unable to branch, state banks did branch where state law permitted placing the national banks at a considerable disadvantage

in the competitive banking field. It was against this background that Congress provided for national bank branches in the McFadden Act of 1927, 44 Stat. 1224, 1228 on branch banking.[3] Congressman McFadden reported on this bill from the Committee on Banking and Currency. In the beginning, the Committee Report states, "Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have been successfully operating within recent years."[4] Later in the same report in discussing Section 8 it is stated, "This section recognizes the right of national banks to establish branches within those cities in which State banks have that privilege * * *." Finally, the report concludes in part with, "The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks." It seems clear to us at this juncture, that Congress meant in the McFadden Act to put national banks on a par with state banks insofar as branching was concerned, and to do this, they made state law controlling on the question of national bank branches. But our investigation of the history of branch banking cannot end here, for in 1932, owing to the financial crisis of those times, Congress again considered branching by national banks.

[3] "(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question."

[4] H.Rept. No. 83, 69th Cong., 1st Sess. (1926).

In 1932 the Senate considered a bill (Senate Bill 4412) which would allow branch banking by national banks irrespective of the various state laws. Senator Glass, the committee chairman, did point out at the time that this was a highly controversial subject[3] The main objection the opponents had to this bill concerning the branching provision was that it would constitute an invasion of the sovereign rights of the states to establish federal banks within their boundaries not approved by local policy. Apparently at this time, most states did not approve of branch banking.[4] It was at this time that Senator Bratton[5] of New Mexico offered his amendment to the bill which as modified was finally passed. We deem Senator Bratton's comments in regard to the bill highly noteworthy when in Vol. 76, Cong. Rec. p. 1449, he indicated that under existing law a national bank may engage in branch banking if the law of the state where the national bank is situated permits state banks to do so. Then in commenting on the Glass bill he said, "It is proposed to permit national banks to engage in branch banking whether the law of the State in which a given bank is located permits it or not. It is proposed now to permit national banks to disregard the sentiment of a given State with respect to that question. I think the proposed bill goes too far. It seems to me that the question of whether

[3] Cong. Rec. Vol. 75, p. 9890.

[4] See Cong. Rec. Vol. 75, pp. 9891, 13,002; Vol. 76 pp. 1449, 1997, 2079, 2080, 2090, 2205, 2206.

[5] The Honorable Sam G. Bratton later became a distinguished and highly esteemed member of this court, serving from 1933 until his retirement in 1961.

branch banking shall be permitted in a given State should be determined by the State." The Bratton Amendment was then presented and adopted in the Glass bill.[8] This amendment concerning branch banking also expanded national banks into outside branches or branches outside the city or town of the parent bank. This is (c) (2) of the present section concerning such banks.

Although the Glass Bill including the Bratton Amendment passed the Senate, it failed to pass the House until the next session when the bill was passed by both houses with the Bratton Amendment intact. Two other Congressional comments made in 1933, when § 36 (c) was under consideration in the Congress, one by Senator Glass[9] and

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[8] Cong. Rec. Vol. 76, p. 2205. The amendment read as follows with its amendment.

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000."

[9] Senator Glass, in Vol. 77 Cong. Rec. 3726 (1933) said:

"There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those States which by law permit branch banking to State Banks. It went even further under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which

the other by Congressman Luce,[39] support our interpretation of this statute.

With this, our review of the history of branch banking and § 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933 through the Bratton Amendment despite the fact that originally the Glass bill sought to change that policy. It seems to us a frustration of that policy to say as the trial court did that merely because

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by law permit branch banking should be under the regulations required by State law of State banks.

"How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate."

[39] Congressman Luce stated in Cong. Rec. Vol. 77, p. 5896:

"In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail."

a state in a broad general way sanctions branch banking, that is enough to permit a national branch, even though other vital provisions of state branching laws are not met. In other words, we believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it." While we entertain no doubt of Congress' authority to regulate national banks in whatever way it deems fit, we are convinced that in this area of the law, Congress has restricted its power and acceded to state law which it may certainly do. It is clear to us that the Congress intended to create and maintain a competitive equality between state and national banks. The trial court's interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage. The Comptroller exceeded his statutory authority in the issuance of the certificate authorizing appellee bank to establish and maintain the branch bank.

We will refrain from passing on any of the affirmative defenses raised by the answer of the First Natoinal Bank of Logan because the trial court must properly be

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" For other cases tending to support this view although each construing § 36(c) (2) dealing with outside branches instead of (c) (1) see the following. National Bank of Detroit v. Wayne Oakland Bank, 6 Cir., 252 F.2d 537, cert. denied, 358 U.S. 830; State of South Dakota v. National Bank of South Dakota, 219 F. Supp. 842; Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770, aff'd per curiam, 278 F.2d 871 (D.C. Cir. 1960); and see Rushton Ex Rel. Comr. of Bkg. v. Michigan National Bank, 298 Mich. 417, 299 N.W. 129, 136 ALR 458. We also note, in a factually similar case construing (c) (1) from Utah decided by the U.S. District Court, District of Columbia, held exactly as we do here. Commercial Security Bank v. Saxon, 236 F. Supp. 457 (1964). (Affirmed on appeal without opinion).

given the first opportunity to determine their merits, if any. The judgment of the trial court is REVERSED and the case is REMANDED with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropirate findings of fact and conclusions of law not inconsistent herewith.

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 875 51

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah,
a national banking association,
Petitioner,

v.

WALKER BANK & TRUST COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 875

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah,
a national banking association,

Petitioner,

v.

WALKER BANK & TRUST COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent files this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, reversing the judgment of the United States District Court for the District of Utah, which held that James J. Saxon, Comptroller of the Currency, acted within his authority in issuing his certificate approving and authorizing the establishment and operation by Petitioner of a branch bank in the City of Logan, Utah.

JURISDICTION AND STATUTE INVOLVED

Respondent agrees that Petitioner has invoked this Court's jurisdiction under Title 28, United States Code, Section 1254 (1) and that the federal statute involved is Section 36(c) of the National Bank Act, as amended (12 U.S.C., Sec. 36(c) (1965 Supp.)). Respondent does not agree, for the reasons hereinbelow set forth, that Title 28, United States Code, Section 1331 or Rule 12(h) of the Federal Rules of Civil Procedure are involved, or with the questions presented as stated by Petitioner.

THE QUESTION PRESENTED

The sole question presented is:

Whether the Comptroller of the Currency exceeded his authority under Section 36 (c) (1) of the National Bank Act, as amended (12 U.S.C., Sec. 36 (c) (1)), in issuing to Petitioner a certificate approving and authorizing it to establish and operate a new branch bank in the City of Logan, Utah, if such establishment and operation of a branch by a state bank of the State of Utah in an identical situation with that presented here is not authorized by the law of the State of Utah.

STATEMENT OF THE CASE

Respondent, Walker Bank & Trust Company, is a banking corporation organized under the laws of the State of Utah, with its Main Office located in Salt Lake City, Utah. Respondent operates a branch bank in the City of Logan, Utah, which it acquired on December 18, 1956 as the result of a statutory merger whereby a state bank located and operating in Logan, Utah, was merged with and into Respondent. Logan is a city of the second class as cities are classified by the statutes of the State of Utah.

Petitioner, a national banking association, operates a bank which is located in Logan. Petitioner, with the approval of the Comptroller of the Currency, established a new branch bank in Logan in addition to its main bank located in said city. Respondent brought this action in the United States District Court for the District of Utah against Petitioner and the Comptroller of the Currency to obtain a declaratory judgment that the issuance by the Comptroller of the Currency of his certificate approving and authorizing the establishment and operation of said branch bank violated Section 36(c) of the National Bank Act, and for injunctive relief against the continued operation of said branch bank.

The District Court, by memorandum opinion, held that the Comptroller of the Currency acted within his authority in authorizing the establishment and operation of the branch bank in question and dismissed the complaint and action. On appeal to the United States Court of Appeals for the Tenth Circuit, the court held that the Comptroller exceeded his authority in the issuance of the certificate authorizing Petitioner to establish and operate said branch bank, reversing the judgment of the trial court and remanding the case with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent therewith.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY DETERMINED THE QUESTION PRESENTED.

Section 36 (c) (1) of the National Bank Act in clear and unambiguous language conditions the establishment and

operation of a branch by a national bank within the limits of a city, town or village in which said bank is situated upon such establishment and operation being expressly authorized to state banks by the law of the State in question. It is perfectly clear, as pointed out by the trial court[1] and the Court of Appeals,[2] that the establishment and operation of petitioner's new branch would not be authorized to state banks by the law of the State of Utah.

The Supreme Court of Utah in *Walker Bank & Trust Company v. Taylor,* 15 U.2d 234, 390 P.2d 592 (1964), in construing Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), held that the establishment and operation of a new branch in a city of the second class in which is located a unit bank is not authorized—and on the contrary is prohibited—by said section of the Utah Code, although, as in the instant case, a bank seeking to establish such branch is the only unit bank located in such city. In reaching its decision the Utah Supreme Court pointed out that the only method provided by the Utah statute for acquiring a branch bank in a city of less than the first class having an existing bank is that the bank seeking to establish such branch shall take over an existing bank.[3] It is stipulated that Petitioner did not acquire its branch by taking over an existing bank.

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1. 234 F. Supp. at 76-77.
2. 352 F.2d at 92.
3. The pertinent provisions of Sec. 7-3-6, Utah Code Annotated 1953, are as follows:

   "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The Court of Appeals reviewed at length the legislative history of Section 36 (c) of the National Bank Act and concluded therefrom — as manifest from the language of the Act itself—that Congress intended that a national bank should have no greater rights to establish a new branch than it would under state law if it were a state bank.[4] In *Commercial Security Bank v. Saxon,* 236 F. Supp. 457 (D. D.C., 1964), the court decided a case directly on point involving an action by a state bank of the State of Utah in which it sought a declaratory judgment that the approval by the Comptroller of the Currency of a branch application filed by a national bank to establish a branch in the City of Ogden, a city of the second class, would violate Section 36(c) (1) of the National Bank Act. The court held that the issuance of such certificate by the Comptroller "would constitute a violation of 12 U.S.C.A., Sec. 36" and restrained the Comptroller from issuing his certificate. The judgment of the trial court was affirmed *per curiam* on appeal to the Court of Appeals for the District of Columbia, citing the instant case. (Civil 1815-63, D.C. Cir., filed November 18, 1965.)

It is clear that if Petitioner were a state bank, the law of Utah would prohibit the establishment and operation of its branch bank. The Comptroller of the Currency issued his certificate approving and authorizing the establishment and operation of Petitioner's branch, even though such establishment and operation in an identical situation is not authorized to state banks by the laws of the State of Utah. In so doing the Comptroller exceeded his authority under Section 36 (c) (1) of the National Bank Act as demonstrated by the language of the Act and the legislative his-

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4. For cases supporting the Tenth Circuit decision, see cases cited by it in Footnote 10, 352 F.2d at 94; and see also *Hoosier State Bank of Indiana v. Saxon,* Civil No. 4111, ... F. Supp. ....., (D.C. Ind. 1965).

tory thereof reviewed by the Court of Appeals. A contrary determination on the question presented would require judicial legislation.

II.

THERE IS NO CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS

Contrary to Petitioner's contention, the decision rendered by the Court of Appeals for the Tenth Circuit is not in conflict with the decision rendered by the Court of Appeals for the Fourth Circuit in *First National Bank of Smithfield, North Carolina v. Saxon,* 352 F.2d 267 (4th Cir. 1965). The issues in that case revolved around the question whether the administrative discretion exercised by the Comptroller of the Currency in approving a national bank branch is subject to judicial review invoked by a competing bank under the Administrative Procedures Act.[5] That question was not presented for review nor involved in the cases decided by the Courts of Appeals for the Tenth and District of Columbia Circuits.

The Court of Appeals for the Fourth Circuit vacated the trial court's order annulling and enjoining the Comptroller's issuance of a certificate of approval to a national bank on the ground that the trial court erred in holding that if such certificate is issued by the Comptroller without an adversary hearing conforming to the requirements of the Administrative Procedures Act it is ex facie invalid. In so doing, however, and in remanding the case to the District Court, the Court of Appeals upheld the jurisdiction of the District Court to review de novo the action of the Comptroller. In making such review, the court rejected the contention that the Comptroller's approval is contingent upon his compliance with the inquiries and ascertainments

5. 60 Stat. 237 (1946), as amended, 5 U.S.C., Sec. 1001, et seq. (1964 Edition).

required of the State Commissioner of Banks of North Carolina with respect to the approval of state bank branches and pointed out that Congress intended that the Comptroller in exercising his discretion in approving a branch under Section 36 (c) of the National Bank Act intended to allow the Comptroller to consider as a factor in his decision to grant or refuse approval, the public interest, need and necessity, subject, however, to court review in respect thereto. It is important to note that the Circuit Court of Appeals in that case pointed out that the trial court should first consider "the criteria enumerated in the Banking Act, 12 U.S.C., Sec. 36(c), supra, viz: *Whether the establishment of the branch is 'authorized to State Banks' and the location conforms to the restriction of State laws.*" *Id* 352 F.2d 267 at 272 (emphasis added).

III.

THE QUESTION RAISED BY PETITIONER WITH RESPECT TO THE TRIAL COURT'S JURISDICTION IS NOT SUBJECT TO REVIEW AT THIS STAGE OF THE PROCEEDINGS.

Petitioner seeks a review on the merits of the question whether the trial court lacked jurisdiction over the subject matter, citing *KVOS v. Associated Press,* 299 U.S. 269 (1936) and *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1936). That question is not involved nor subject to review in the present posture of this case.[6]

At the trial of this case in the District Court, Petitioner challenged the court's jurisdiction by a Motion to Dismiss. The trial court found and determined that it had jurisdiction over the subject matter and denied Petitioner's motion. The only record on appeal with respect to the proceedings

6. *Slaker v. O'Connor,* 278 U.S. 189 (1929).

had in the trial court on Petitioner's motion is a minute entry: "Motion of counsel for the First National Bank of Logan to dismiss was denied."

It is clear that the Court of Appeals did not review nor decide any question except that hereinabove stated.[7] The case was: ". . . remanded with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent herewith."[8] This Court should not review on the merits an issue not as yet finally determined.

CONCLUSION

Respondent respectfully submits, for the reasons stated, that the petition for certiorari should be denied.

Respectfully submitted,

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7. The opinion of the Circuit Court of Appeals states: "Our sole question pertains to the authority of the Comptroller to issue such certificate." 352 F.2d at 91.

8. *Id.* at 95.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 875

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

WALKER BANK & TRUST COMPANY, A CORPORATION

AND

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM ON BEHALF OF THE COMPTROLLER OF THE CURRENCY

Under Utah law (Utah Code Ann. (1953), § 7–3–6), a bank chartered by the State may (except in cities of the first class) establish a new branch only by taking over an existing bank. Logan, Utah, is not a city of the first class, and is hence subject to this limitation. The First National Bank of Logan sought the approval of the Comptroller of the Currency for permission to open a branch in Logan, not by taking over an existing bank, but by opening a new office. Approval was granted. Walker Bank & Trust Co., a bank chartered by the State of Utah and having a

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branch in Logan, then brought this action against the Comptroller contending that his action in approving First National's branch application was barred by 12 U.S.C. 36(c), which provides that a national bank may, with the Comptroller's approval, establish and operate branch banks "[w]ithin the limits of the city, town or village in which * * * [the bank] is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." The Court of Appeals for the Tenth Circuit upheld the State bank's position, holding that Utah's "take over" limitation is binding upon the national banks located in the State by virtue of 12 U.S.C. 36(c). 352 F. 2d 90. First National, a defendant below, filed a petition for a writ of certiorari to review the Tenth Circuit's judgment.

The identical issue presented here—whether Utah's "take over" limitation applies to national banks by virtue of 12 U.S.C. 36(c)—is also raised in *First Security Bank of Utah* v. *Commercial Security Bank*, No. 1009, October Term, 1965, pending on petition for certiorari to the District of Columbia Circuit. Indeed, in holding for the State bank in *Commercial Security*, the District of Columbia Circuit rendered no opinion, but merely cited the Tenth Circuit's decision in the instant case. The Solicitor General, simultaneously herewith, has filed a petition for certiorari on behalf of the Comptroller in the District of Columbia case.[1]

[1] We see no distinction between the instant case and *Commercial Security*. We have refrained from filing a petition in this case merely to avoid unnecessary duplication.

In view of the identity of issues in the two cases, and for the reasons set forth in our petition in *Saxon* v. *Commercial Security Bank,* we urge the Court to grant the petition for certiorari in the instant case.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

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NO 73

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1069~~ 73

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner,*

v.

COMMERCIAL SECURITY BANK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner,*

v.

COMMERCIAL SECURITY BANK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-captioned case on November 18, 1965.

OPINIONS BELOW

The opinion of the District Court is reported in 236 F. Supp. 457. A true copy appears in Appendix A to this brief. The judgment of the Court of Appeals, rendered without opinion, will not be reported. A true copy appears in Appendix A to this brief.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 18, 1965. (R. 67). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. WHETHER, in view of the provisions of United States Code, Title 12, Sec. 36(c)(1), as amended, which empowers the Comptroller of the Currency

> : to authorize national banks to establish and operate branches within the limits of the city in which said national bank is situated, if such establishment and operation are at the time expressly authorized to State banks by the laws of the state in question,

and further in view of Utah Code Annotated, 1953 Sec. 7-3-6, as amended, under the provisions of which State banks may establish and operate branches in Ogden by acquiring an existing State bank, THE COMPTROLLER OF THE CURRENCY HAD THE AUTHORITY TO AUTHORIZE PETITIONER TO ESTABLISH AND OPERATE A BRANCH IN OGDEN, UTAH.

WHETHER Respondent had the necessary standing to bring the action below.

STATUTES INVOLVED

The pertinent statutory provisions, both federal and state, are set forth in Appendix B to this brief.

STATEMENT

The facts are not in dispute. Petitioner is a national bank with its principal office and one branch in Ogden, Utah. Respondent is a state bank with its principal office and one branch likewise in Ogden, Utah. (R. 20, 23, 24).

Two other state banks have their main offices in Ogden, namely, the Bank of Utah and the Bank of Ben Lomand. (R. 20, 23).

Ogden is classified as a city of the second class under the Utah Bank Statute (Utah Code Ann. Title 10, Chap. 1, Sec. 1, (1953, as amended)). (R. 20, 24).

On June 25, 1963, the Petitioner filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish a second branch in Ogden. On July 18, 1963, the Respondent brought the action below, seeking to enjoin the Comptroller of the Currency from approving the branch application on the ground that it would violate 12 U.S.C. § 36. On June 9, 1964, the Comptroller notified Petitioner that its branch application had been approved, but the district court enjoined the Comptroller from issuing the Certificate of Authority to Petitioner, which was necessary before the branch could be opened. (R. 19, 20).

The Court of Appeals then affirmed the district court, without opinion, merely citing *Walker Bank & Trust Company* v. *James J. Saxon,* F. 2d (10th Cir., 1965).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred:

1. In holding that the Comptroller did not have statutory authority to authorize Petitioner to establish and operate a branch bank in Ogden, Utah.

2. In holding that Respondent had the necessary standing to bring the action below, and

3. In affirming the Order of the District Court.

REASONS FOR GRANTING THE WRIT

(A) Conflict in Circuits:

The decision of the courts below in the instant case and in *Walker Bank & Trust Company* v. *James J. Saxon,* F. 2d (10th Cir., 1965), upon the authority of which the instant case was decided, are directly in conflict with the decision and opinion of the United States Court of Appeals for the Fourth Circuit in *First National Bank of Smithfield, North Carolina* v. *James J. Saxon,* F. 2d (4th Cir., 1965).[1]

The basic issue in this case may be described as follows: 12 U.S.C. § 36(c)(1) provides, in effect, that in a given city, if a state bank can establish a branch there, then the Comptroller of the Currency can authorize a national bank to establish a branch there. In our case, it is undisputed that a state bank can establish a branch in Ogden, Utah. Since this is so, the Comptroller and Petitioner reasoned, then a national bank can also establish a branch there. Respondent State bank, however, took the position that since a state bank could establish a branch bank in Ogden only by means of acquiring an existing Ogden

[1] This opinion is set forth in full as Appendix C to this brief.

bank, then a national bank can establish a branch only by acquiring an existing Ogden Bank. The Comptroller and Petitioner reply that the Comptroller is not bound by State criteria as to the "method" or "means" of establishing a branch, and since a State bank can open a branch in Ogden under Utah law, so too, with the Comptroller's authorization, can a national bank. The Court of Appeals in the instant case and the Tenth Circuit in *Walker Bank, supra,* agreed with Respondent.[2] In the *Smithfield* case, *supra,* the Fourth Circuit agrees with Petitioner.

In *Smithfield,* the First National Bank of Eastern North Carolina applied to the Comptroller of the Currency for authorization to establish a branch in the town of Smithfield, North Carolina. The applicant had its principal office at New River, North Carolina, and also had eleven branches in the eastern part of the State. Subsequently, the Comptroller of the Currency gave the necessary approval to the applicant Bank, but without a formal statement of facts, conclusions of law or opinions. A rival State bank, the Bank of Smithfield, then brought an action to have the Comptroller's determination declared illegal and enjoined. The State bank contended that the Comptroller's approval to a national bank to branch is contingent upon compliance by the Comptroller with the inquiries and ascertainments required of the State Commissioner of Banks by North Carolina law. The North Carolina law provided that no branch should be permitted save upon the approval of the Commissioner of Banks, which "may be given or withheld by . . . [him] in his dis-

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[2] Petition for a writ of certiorari to the Tenth Circuit was filed in this Court on January 4, 1966 by the First National Bank of Logan. It bears number 875 October Term 1965.

cretion"; that "in exercising such discretion . . . [he] shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank . . . its future earnings prospects, and the general character of its management"; and that the approval shall not be given until the Commissioner shall have "ascertained to his satisfaction (i) that the establishment of such . . . will meet the needs and promote the convenience of the community to be served by the bank and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch . . . and of the existing bank or banks in said community."

The State bank argued that all of these requirements of North Carolina law were incorporated into 12 U.S.C. 36(c). In answer, the Fourth Circuit said (page 18a, Appendix):

> "We disagree with the argument. Assuming arguendo that the North Carolina Statute does demand as a condition precedent to the approval of a branch, an ascertainment of need and convenience, with discretion in decision nevertheless always retained by the Commissioner, in our judgment, this command has not been extended to the Comptroller by the National Banking Act.
>
> "That the phrase 'restrictions as to location"[3] does not advert to economic factors of need and convenience, but refers exclusively to a geographical de-

[3] While the Court was speaking of 12 U.S.C. 36(c)(2), and the statute involved in the instant case is 12 U.S.C. 36(c)(1), still the principle is the same. In both cases, the State bank maintains that all conditions placed upon State banks by State law are by 12 U.S.C. 36(c) also placed upon the Comptroller of the Currency. It is the adoption of this theory upon which the decision below in the instant case was based.

> termination is quite plain from the legislative history of the Act.".

The Fourth Circuit, in *Smithfield,* (page 21a, Appendix), then went on to say:

> "The standards by which the Comptroller's action will be measured are, first, the criteria enumerated in the Banking Act, 12 U.S.C. 36(c), Supra, viz: whether the establishment of the branch is 'authorized to state banks' and the location conformed to the restriction of State laws."

In the instant case, the restriction as to location does not expressly appear because that restriction is found in 12 U.S.C. 36(c)(2), and not 12 U.S.C. 36(c)(1). Petitioner agrees with the Fourth Circuit that the criterion is "whether the establishment of the branch is 'authorized to State Banks' ". In the instant case, the establishment of a branch is authorized to a State bank in Ogden, Utah, and the fact that the State places the additional requirement dealing with the means of establishing the branch, i.e., merger or acquisition, does not mean, as the Court below held, that these conditions are also read into federal law and placed upon the Comptroller of the Currency.

The Petitioner respectfully submits to this Court that there is a clear conflict now between the Fourth Circuit in the *Smithfield* case, on the one hand, and the District of Columbia and the Tenth Circuits, on the other hand.

(B) Importance of the Question:

Clearly the question presented is of the utmost importance to the regulation and growth of the Federal banking system, to the place of the Comptroller in that

system with relation to branch banking, and to the extent to which State laws impose restrictions upon the Comptroller of the Currency in connection with his authorization of branch banks. If, as the Court below in the instant case held, the Comptroller is bound by State statutory criteria, in addition to those expressly set forth in 12 U.S.C. Section 36(c), then a substantial amount of chaos has been injected into the Federal regulation of National Bank branches.

(C) The Decision of the Court Below Was Erroneous:

The decision of the Court below is, Petitioner submits, erroneous and the conflicting decision of the Fourth Circuit Court of Appeals in *First National Bank of Smithfield* v. *James J. Saxon, supra,* correct.

Had it wished to establish a "policy of equalization" putting State and Federal banks on an exact basis of equality with respect to branching, Congress could have done so by simply enacting a statute making National banks subject to the State laws governing State banks in the particular State in which the National bank was located. Congress, however, did not do this. National banks are subject to the laws of the United States and are not subject to the laws of the State, except insofar as Congress has expressly provided. *Van Reed* v. *Peoples National Bank,* 198 U.S. 554 (1905); *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963). It is clear that unless Congress has expressly provided that the laws of the State of Utah dealing with the method of establishing a branch of a State bank shall also control the method whereby National banks may establish branches, then the action of the Comptroller in authorizing the branch to Peti-

tioner was proper, and the judgment of the Court below should be reversed.

The words of 12 U.S.C. 36(c)(1), the governing statute, are clear and unambiguous. That Section provides that a national bank may, with the Comptroller's approval, establish a branch within the limits of the city in which it is situated, if such establishment is at the time expressly authorized to State banks by the laws of the State in question. As Judge Christenson found in *Walker Bank & Trust Co.* v. *James J. Saxon and the First National Bank of Logan,* 234 F. Supp. 74, 77,[4] branches *are* expressly authorized to State banks by Utah law under the circumstances of the present case. No one really takes issue with the fact that both Petitioner, a State bank, and Respondent, a National Bank, are authorized to establish branches in Ogden, Utah. The crux of the case is whether Petitioner is bound by the condition of "acquisition" placed upon State banks by a State statute. No federal statute states that this State limitation on the method of establishing a branch shall apply to national banks, and no one even suggests that other State conditions, such as those dealing with capitalization and other requirements, apply to national banks.

Indeed, this Honorable Court, in *Whitney National Bank of Jefferson Parish* v. *Bank of New Orleans and Trust Co.,* 379 U.S. 411 (1965), recognized, at least impliedly, that the restrictions contained in State laws deal only as to the question of "where" the comptroller may authorize a branch and not as to "how", the Comptroller may authorize a branch.

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[4] Reversed in the *Walker Bank* case, discussed above.

In the *Whitney,* case, this Court said:

> "La. Rev. Stat. § 6:54 (1950) prohibits banks from opening branch offices in parishes other than their home parish, and these *geographical limitations* are made applicable to national banks by the Banking Act of 1933, 12 U.S.C. § 36(c)(2) (1958 Ed.)." (Emphasis added). 379 U.S. 411, 13 L. ed. 2d 386, 390, Footnote 1.

The theory of Respondent and of the Court below, should it become the law of the land, could severely cripple the discretion which Congress intended the Comptroller of the Currency to have. In the instant case, for example, the Utah Statute provides that a bank must be in existence for at least five years before it can be acquired to be used as a branch by another bank. Assume a national bank has been in existence for less than five years, and is in such dire financial straits as to be on the brink of failure. Another national bank wishes to acquire it, and the Comptroller, wishing to prevent the failure, determines to follow the oft-used course of preventing the failure by merging the unsound bank with a sound bank. Under the theory of the Court below in the instant case, this cannot be accomplished because state law does not allow a bank to be acquired as a branch until the bank is in existence five years, and, so the Court has ruled, State law governs the Comptroller under circumstances such as these.

CONCLUSION

Petitioner submits that the exact point on which the Court below was in error is the same point which lends such importance to this case, namely, just what state criteria are binding upon the Comptroller of the

Currency in connection with branching by National banks. Petitioner respectfully submits that the Fourth Circuit in *Smithfield* was correct and that the Court of Appeals below in the instant case, and the Tenth Circuit in the *Walker Bank* case, were incorrect in their holdings.

For the reasons set forth, therefore, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CHARLES J. STEELE
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February, 1966

APPENDIX A

[Filed December 18, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 1815-63

COMMERCIAL SECURITY BANK, *Plaintiff*,

v.

JAMES J. SAXON, Comptroller of the Currency, *Defendant*.

FIRST SECURITY BANK OF UTAH, N.A., *Intervenor-Defendant*.

Memorandum and Order

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the "second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18, 1963, the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U. S. C. A. § 36, and an injunction to restrain the Comp-

troller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, On July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

> ". . . that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction . . . that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction."

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit. The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its business and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company,*

323 F. 2d 290, 300 (C.D.A.C., 1963), cert. granted 376 U.S. 948:

> "The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra*, at page 300, the Court stated, ". . . there is no discretion to unlawfully issue a certificate.", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U.S.C. § 36(c) (1927, as amended), which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at*

the time expressly authorized to State banks by the law of the State in question; . . .". [emphasis supplied].

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.*" [emphasis supplied].

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would clearly have been denied.[1] The question before this Court, therefore,

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[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co.* v. *Taylor,* 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

Tne defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was ". . . the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches." (at page 775. Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, reecntly held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defendant

national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish a new branch. The *Commercial Bank of Roseville* case, *supra,* as well as other cases emphasizing the controlling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels impelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12, U.S.C.A. §§ 21-213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states

[2] 12 U.S.C.A. §§ 36(c), 51, 85, 92a(a), and 214c.

are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states at that time did allow branching, however, and as a result, the competitive situation was so imbalanced that the Comptroller in his 1924 report (Government Printing Office), stated, at page 4:

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system."

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c). (1933, as amended) set out below:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, estab-

> lish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks . . .".

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra,* that it is bound to hold that the exact standards of the Utah branching law must be applied to the First Security Bank of Utah, N.A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Cur-

rency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N.A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets, Ogden, Utah, would constitute a violation of 12 U.S.C.A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

ORDERED, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

ORDERED, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

ORDERED, that the Motion of Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

IT IS FURTHER ORDERED, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N.A., which is the subject matter of this cause of action.

LEONARD P. WALSH
Leonard P. Walsh, *Judge*

[Filed November 18, 1965]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1965

No. 19,356

FIRST SECURITY BANK OF UTAH, N. A., *Appellant*,

v.

COMMERCIAL SECURITY BANK, *Appellee*.

No. 19,357

JAMES J. SAXON, Comptroller of the Currency, *Appellant*,

v.

COMMERCIAL SECURITY BANK, *Appellee*.

Appeals from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, and WRIGHT and TAMM, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed. *Walker Bank & Trust Company* v. *James J. Saxon, Comptroller of the Currency, et al.*, decided October 26, 1965, No. 7981, C.C.A. Tenth Circuit.

It is further ORDERED by the court that all parties bear their own costs on these appeals.

Per Curiam.

Dated: Nov. 18, 1965

APPENDIX B

Statutes

The following statutory provisions are the ones involved in this case.

I

United States Code, Title 12, Sec. 36(c), as amended, provides, in pertinent part:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> "(1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and
>
> "(2) At any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State Banks."

(12 U.S.C. 36(c)(1) was enacted in 1927; 12 U.S.C. 36 (c)(2) was enacted in 1933).

II

Utah Code Annotated, 1953, Sec. 7-3-6, as amended, provides, in pertinent part:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be estab-

lished in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9795

FIRST NATIONAL BANK OF SMITHFIELD, North Carolina,
Appellee,

v.

JAMES J. SAXON, Comptroller of the Currency of the United States, *Appellant.*

No. 9796

FIRST NATIONAL BANK OF SMITHFIELD, North Carolina,
Appellee,

v.

FIRST NATIONAL BANK OF EASTERN, North Carolina,
Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Algernon L. Butler, Chief Judge.

(Argued April 7, 1965. Decided October 21, 1965.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

David L. Rose, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, Morton Hollander, Attorney, Department of Justice, and Robert H. Cowen, United States Attorney, on brief) for Appellant in No. 9795, Carl V. Venters for Appellant in No. 9796, and John R. Jordan, Jr., and Herbert L. Toms, (E. V. Wilkins and F. T. Dupree, Jr., on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

The Comptroller of the Currency's approval of the establishment of a branch of a National bank[1] is ex facie invalid,

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[1] Banking Act of 1933, 48 Stat. 189, 190, as amended, 12 USC 36(c), (e) (1964 Ed.).

the District Court has held, if it is issued by the Comptroller without a hearing conforming to the requirements of the Administrative Procedure Act.[2] In this view[3] we think the Court was mistaken. Throughout it must be remembered that we are not deciding whether it would be advisable or more equitable for the Comptroller to grant a hearing. We are deciding only that the law does not require it.

This is not to say that there may not be judicial review of the Comptroller's action. We hold, too, that the bank's competitors have standing to seek the review, not because of the potential sharpening of competition, but because they have an immediate concern, apart from the public generally, to prevent an approval contrary to law. Thus they are "interested" within the purpose of § 1004(b), APA.

The First National Bank of Eastern North Carolina applied to the Comptroller of the Currency on July 11, 1963 for authorization to establish a branch in the Town of Smithfield, North Carolina. The applicant has its principal office at New River, North Carolina and eleven branches in the east end of the State. In a field investigation made by the Comptroller preparatory to consideration of Eastern's request, an examiner called upon the First National Bank of Smithfield, North Carolina. Thereupon the latter sought and obtained a conference with the Comptroller's office, on August 5, 1963, where its representatives pressed objection to the advent of a new bank in town. Eastern was not present or heard at that time.

Approval was given the Eastern application by the Comptroller on August 19, 1963, without a formal state-

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[2] 60 Stat. 237 (1946), as amended, 5 USC 1001 et seq. (1964 Ed.) Section reference hereinafter will be to U.S.C. (1964 Ed.).

[3] First Nat. Bank of Smithfield, N.C. v. First Nat. Bank of E.N.C., 232 F. Supp. 725 (E.D.N.C. 1964).

ment of fact findings, conclusions of law or opinion. However, no certificate of authority then issued. Bank of Smithfield brought this action on September 9, 1963 to have the Comptroller's determination declared illegal and enjoined. The bank denied any need or necessity for Eastern's branch, predicted irreparable damage to follow from the permitted entry of another bank in the Town and averred that the approval was illegal because arbitrary, capricious and contravening the Comptroller's own regulations.

In limine the complaint charged the Comptroller's procedure violative of the Administrative Procedure Act and abridging the rights of the Smithfield Bank without Constitutional due process of law. More specifically in this regard, it alleged that the Comptroller's ruling was an adjudication under § 1004, APA, which could not be made without notice and a full-dress hearing. This primary position the District Court upheld.

The Banking Act in pertinent part, 12 USC 36(c) (1964 Ed.),[4] provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such au-

[4] Section 36(e), also, provides: "No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency."

thority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . ."

The North Carolina statute, to be read under the reference in the Banking Act, is G.S. 53-62. It permits the establishment of bank branches with the approval of the Commissioner of Banking which "may be given or withheld [by him] in his discretion". In this judgment he is required to consider stated relevant factors.

Assuming that the Comptroller is an "agency", that the approval by the Comptroller is a "license" and that the consideration by him of the application is an "adjudication", all within the meaning of § 1001, still no requirement is found in the APA of the hearing now claimed by the Bank of Smithfield. The provision on which appellee relies is § 1004, but that section compels an agency hearing only when the "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing", and there is no such compulsion here.

The District Judge thought that the implication of the APA was to command an adversary hearing before the Comptroller. This inference, we think, is unwarranted. Not only is statutory foundation wanting for it, but the legislative history of the APA discloses that Congress expressly disavowed any intent that the Act demand a hearing except where already required by some other statute. See: Statement of the Chairman of the Drafting Subcommittee, 92 Cong. Rec. 5651, 5655; Sen. Rept. No. 752, 79th Cong., 1st Sess., pp. 6, 7, 16 (1945); H.Rept. No. 1980, 79th Cong., 2d Sess. pp. 10, 18, 26 (1946). For compilation see Sen. Doc. No. 298, 79th Cong., 2d Sess., pp. 192, 193, 202, 244, 252, 260, 359, 370 (1946).

Furthermore the uniform administrative practice of the Comptroller for a hundred years has sanctioned his present

course. True, his own regulations had permitted an adversary hearing, but resort to these rules was entirely at his option. 12 C.F.R. § 4.8(d)(e)(1963). It is stipulated that when Eastern's application came before the Comptroller, these regulations were in suspense pending revision—they had been rescinded on February 20, 1963, 12 C.F.R. Part 4 (Cum. Supp. 1965), and were not republished until June 9, 1964. 12 C.F.R. § 4.1 et seq. (Cum. Supp. 1965). The practice in the Comptroller's office has not gone unquestioned, but it has never been disapproved. N. W. Bancorporation v. Board of Governors, 303 F. 2d 832, 843 (8 Cir. 1962), citing Davis, Administrative Law Treatise, § 4.04, pp. 247-248. This strongly argues its validity. Zemel v. Rusk, ... U.S. ... (May 3, 1965) 33 U.S.L. Week 4419; Paragon Coal Co. v. Commissioner, ... U.S. ... (April 28, 1965), 33 U.S.L. Week 4361.

Procedural due process is not offended by the Comptroller's practice. The absence of a hearing provision in the Banking Act raises no Constitutional question, for the omission was within the power of Congress. Bridgeport Fed. Sav. & L. Assn. v. Federal Home Loan Bank Bd., 307 F. 2d 580, 581 (3 Cir. 1962), cert. den., 371 U.S. 950. However, all apprehension is dissipated by the APA's grant in § 1009 of a review of the Comptroller's decision in the District Court to any party in interest. Lichter v. United States, 334 U.S. 742, 791 (1948); cf. Communications Comm'n. v. WJR, 337 U.S. 265, 274 (1949).

Abundant authority, with which we agree, holds that the Comptroller's determination in the present area is not immunized from review by the exemption in the preface of § 1009, APA, reading, "Except so far as . . . agency action is by law committed to agency discretion." Any discretion vested in the Comptroller in passing upon applications for approval of bank branches is not the type of discretion to which action has been "committed by law" but is rather one of the character expressly made reviewable by § 1009

(e)(1). 4 Davis, Administrative Law Treatise, § 28.16; Community National Bank of Pontiac v. Saxon, 310 F. 2d 224 (6 Cir. 1962); Whitney Bank v. Bank of New Orleans, 379 U.S. 411, 428 (1965) (dissenting opinion of Justice Douglas); Commercial Security Bank v. Saxon, 236 F. Supp. 457 (D.D.C. 1964).

Protestant Smithfield Bank also contends that the Comptroller's approval is contingent upon his compliance with the inquiries and ascertainments required of the State Commissioner of Banks by the North Carolina statute, G.S. 53-62 supra. It stipulates: that no branch shall be permitted save upon the approval of the Commissioner of Banks, which "may be given or withheld by . . . [him] in his discretion"; that "in exercising such discretion, [he] shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, . . . its future earnings prospects, and the general character of its management"; and that the approval shall not be given until the Commissioner shall have "ascertained to his satisfaction (i) that the establishment of such . . . will meet the needs and promote the convenience of the Community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch . . . and of the existing bank or banks in said community".

The Federal statute, the protestant continues in argument, incorporates all of these requirements and exacts analagous compliance with them by the Comptroller. For this contention reliance is placed upon the clause in 12 USC 36(c), supra, directing that the establishment of a National bank branch be "subject to the restrictions as to location imposed by the law of the State on State banks". We disagree with the argument. Assuming arguendo that the North Carolina statute does demand as a condition precedent to the approval of a branch, an ascertainment of need and convenience, with discretion in decision neverthe-

less always retained by the Commissioner, in our judgment this command has not been extended to the Comptroller by the National Banking Act.

That the phrase "restrictions as to location" does not advert to economic factors of need and convenience, but refers exclusively to a geographical determination is quite plain from the legislative history of the Act. In Congress, debate on the bill which became the heart of the current Act, 12 USC 36(c), supra, was between advocates of unlimited National bank branching and those favoring its equation with the branch privileges of State banks. Generally the latter had been confined to the municipality of the parent bank, to immediately adjacent areas or to other territorial regions. By way of compromise the present clause was added with the intent of restricting National branches to the city-wide, county-wide or State-wide delimitation circumscribing the State banks. There was no other reason for the words "subject to the restrictions as to location imposed by the law of the State on State banks." H. Rept. 83, 69th Cong., 1st Sess., pp. 2, 4-7 (1926); 68 Cong. Rec. 5816; McFadden Act, 44 Stat. 1228; S. Rept. 584, 72nd Cong., 1st Sess., pp. 1-6, 11; S. Rept. 77, 73d Cong., 1st Sess., pp. 11, 16-17; 77 Cong. Rec. 3726, 5896; Banking Act of 1933, 48 Stat. 189, 12 U.S.C. 36(c).

For the court review no evidential record need first be developed before the Comptroller. No such prerequisite is exacted by the APA; plainly it envisions instances where the evidence initially is to be taken in a suit reexamining the agency action. To this end the Act gives the court jurisdiction to "hold unlawful and set aside agency action . . . found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo . . . ." § 1009 (e)(6). Nothing in the statute precludes the court from discovering the facts for the first time.

The court will not be held to the substantial-evidence rule, that is it will not be limited to the ascertainment of

whether, on the record as a whole, there is substantial evidential and factual support for the Comptroller's action. Cf. 4 Davis, Administrative Law Treatise, supra, § 29.01; Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision. This is the necessary and plain intent of the APA in § 1009(e)(6) just quoted.

The Banking Act, 12 USC 36(c), in permitting bank branching "with the approval of the Comptroller of the Currency" intended, we think, to allow the Comptroller to consider as a factor in his decision to grant or refuse approval, the public interest, need and necessity, and, subject to court review, to exercise his discretion in determining such interest, need or necessity. Apfel v. Mellon, 33 F. 2d 805, 806, 807 (D.C. Cir. 1929), cert. den., 280 U.S. 585 (1929).[5] On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action.

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[5] But cf. Whitney Bank v. New Orleans Bank, 379 U.S. 411, 423 (1965) posing the query whether the action of the Comptroller in granting an original charter is more than routine.

The standards by which the Comptroller's action will be measured are, first, the criteria enumerated in the Banking Act, 12 USC 36(c) supra, viz: whether the establishment of the branch is "authorized to State Banks" and the location conforms to the restriction of State laws. The capital requirements of the statute have, concededly, been met. If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion. Mastrapasqua v. Shaughnessy, 180 F. 2d 999, 1002 (2 Cir. 1950).

A competitor qua a competitor is not ineligible to seek the review. Admittedly, threat of competition is not ground for rejection of the application. Tennessee Power Co. v. T.V.A., 306 U.S. 118, 139 (1939). Nevertheless a competitor has an obvious interest sufficient to warrant his insistence that no branch bank be established through procedures or upon grounds not acceptable under the permissive statutes. Alabama Power Co. v. Ickes, 302 U.S. 464, 484 (1938); Union Savings Bank of Patchogue v. Saxon, 335 F. 2d 718 (D.C. Cir. 1964); National Bank of Detroit v. Wayne Oakland Bank, 252 F. 2d 537, 544 (6 Cir. 1958), cert. den., 358 U.S. 830; North Arlington Nat. Bank v. Kearney Fed. Sav. & L. Assn., 187 F. 2d 564 (3 Cir. 1951), cert. den., 342 U.S. 816.

With the Smithfield Bank we think the Comptroller is obliged to "state and currently publish in the Federal Register" the "general course and method by which [his] functions are channeled and determined" and "publish" or "make available to public inspection all final opinions or orders in the adjudication of cases" (except when confidential) and "all rules" as directed by the APA, § 1002.

This requirement applies to "every agency". Save for the temporary suspension, already mentioned during which the approval in suit was sought and obtained, the Comptroller apparently did promulgate and publish advices of his procedures. No complaint can be made that word of his intention to grant the approval did not seasonably reach the Smithfield Bank.

The intermission of the rules and regulations did not flaw the Comptroller's actions during that period, for the only penalty of the statute for the omission is to excuse compliance by outsiders with the requisite procedure. Furthermore, in view of our conclusion that the Smithfield Bank was not, in any event, entitled to a formal hearing before the Comptroller, the temporary absence of an outline of the procedure before him could not have prejudiced the bank.

The District Court overturned the Comptroller's approval solely because of the absence of an APA hearing before him; it did not resolve the merits of the complaint. Upholding the jurisdiction of the District Court of this suit, we will request the Court to review de novo the action of the Comptroller. To this end the order annulling and enjoining his issuance of a certificate of approval to the First National Bank of Eastern North Carolina will be vacated and the case remanded, the District Court being empowered to reinstate its injunction pendente lite if it should be so advised. Whitney Bank v. Bank of New Orleans, supra, 379 U.S. 411.

Reversed and remanded.

[Filed October 21, 1965]

SOBELOFF, *Circuit Judge,* dissenting:

With great respect, I take a different view from my brethren as to the nature of the issues raised in this case.

The plaintiff, First National Bank of Smithfield, North Carolina, was notified in July, 1963, that First National Bank of Eastern North Carolina had applied to the Comptroller for permission to open a branch in Smithfield, North Carolina. Smithfield promptly requested the Comptroller to give it access to the application, the supporting data, and the report of the Regional Bank Examiner, so that it could attempt to refute them at the informal conference set before the Comptroller. This request was denied.

The Comptroller offers no explanation for denying this seemingly reasonable request, nor does he point to any interest to be served by the denial. We move here in no area involving emergency or security considerations. The Comptroller's position strikes me as unfair, unwise and administratively unnecessary. History has given impressive evidence of the necessity for informed and objective regulation of our banking system. Questionable banking practices and excessive competition in the past led to disastrous results during the Great Depression. By affording objecting banks an adequate opportunity to be heard the Comptroller receives the benefit of a report suggesting reasons why the particular application should not be granted. The self-interest of the complainant may thus serve the public interest by raising considerations that might otherwise never come to light before the Comptroller. Thus, in presenting its own position, the objecting bank is also arguing that of the community which has a vital interest in the solvency of its local banks. The bank can perform this useful function only if it is allowed to know the supporting data presented to the Comptroller by the applicant.

The plaintiff bank is acutely interested in the competition threatened by Eastern's application for permission to establish a branch bank in Smithfield, North Carolina. Rightly, I think, the majority holds that this interest is sufficient to entitle the Smithfield bank to appeal from the Comptroller's decision granting the application. Smithfield contends, however, that this right of appeal is meaningless unless it has previously been given an *effective* chance to be heard before the Comptroller reaches his final decision on the merits of the application. With this contention I agree, and would hold that such an opportunity, if requested, is a prerequisite to a valid decision on the part of the Comptroller. The right of the plaintiff to appear is of little worth to it if there is no disclosure of the pertinent data and if the Comptroller may make up his mind in a private huggermugger with the applicant.

The action of the Comptroller in issuing a branch bank license, being based in large part on an exercise of discretion, cannot in any true sense be subjected to review *de nova*, as my brethren indicate, for it may be reversed only if it is found to be "arbitrary, capricious, or an abuse of discretion." 5 U.S.C.A. § 1009(e); *Community National Bank of Pontiac* v. *Saxon*, 310 F. 2d 224, 226 (6th Cir. 1962). If an objector has been granted no adequate opportunity to present his position before the case reaches the district court stage, a protest will usually be of little avail since the decision under attack comes clothed with a presumption of correctness.

Smithfield's argument is that it should be allowed to inform itself and express its views before the Comptroller arrives at his decision which will be accorded a large measure of finality in any appeal. Although the court review by brethren hold out to the complaining party may euphemistically be called a hearing *de novo*, the complainant comes into the reviewing court severely hobbled. The Comptroller's mind has been made up *ex parte* upon hear-

ing from the proponent only, but not effectively from any opponents, for they have been kept in the dark as to the issues and the evidence. The operative scope of the court review being limited, it cannot easily repair any damage resulting from the inadequate practice followed by the Comptroller.

I have difficulty, as I think the District Judge on remand will have difficulty, in reconciling two statements in the majority opinion. First it is said that "there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision." (It bears repeating that the Comptroller makes a secret of the facts he has adopted.) In the second statement the court says: "If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion."

How can the District Court conduct a proper examination if the Comptroller has not disclosed what issues he is resolving? The District Court is told to make its own *de novo* fact-findings, but it is still in no position to judge how far the Comptroller's decision rests upon fact-findings which the court deems erroneous and how far it is an exercise of discretionary judgment. It is not apparent how the District Court, observing the admonition against any opening-presumption of correctness, can be sure that it is not intruding in the area of the Comptroller's discretion, for concededly the court may not substitute an independent discretion.

The Comptroller has not divulged his mental processes, and his determinations of fact, rulings of law and exercises of discretion and judgment are inextricably intermingled.

The District Court is thus placed in the unhappy position of choosing between two equally unacceptable alternatives. Either it must blindly assume that the Comptroller's discretion rests upon an adequate basis in fact, in which event the court review almost inevitably becomes a meaningless gesture; or the District Court, proceeding upon the basis of facts independently determined by it, must act in ignorance of the nature of the decision it is reviewing, in which case the court's judgment is liable to usurp the Comptroller's function. We should not require or tolerate such a game of "blind man's bluff." The majority opinion leaves the District Court without guidance in the dilemma thus created.

The District Court held, in accordance with the objecting bank's contention, that a permit issued by the Comptroller after his bobtailed procedure ought not be permitted to stand. While the court's order setting aside the Comptroller's action did not in terms order a rehearing, it was left open to the Comptroller to remedy the deficiency by holding an appropriate administrative hearing.

The indiscriminate use of the term "hearing" has tended to obscure the issues in this case. An administrative hearing may be either a formal, trial-type procedure or an informal conference. For many years the Comptroller pursued the latter course with great success, and I share the majority's reluctance to interfere. With a different but perhaps analogous question before it (namely the appointment of a receiver), the Supreme Court has indeed noted that more formal procedures, constitutionally necessary in some situations, may not be indispensable in banking cases because of "the delicate nature of the institution and the impossibility of preserving credit during an investigation * * *." But the Court went on to warn that this "is a heavy responsibility to be exercised with disinterestedness and restraint * * *." *Fahey* v. *Mallonee*, 332 U.S. 245, 253-54 (1947).

The absence of a constitutional compulsion to conduct a trial-type hearing does not completely answer the objecting bank's protest. The Comptroller's utilization of informal conferences to settle controversies arising out of branch bank applications is certainly an efficient procedure, but while informality is permissible, it may not be administered unfairly.

More attention needs to be paid to the problem of protecting against arbitrary exercises of administrative discretion when it is decided that the safeguards of a trial-type hearing are not appropriate. In commenting on this problem a pioneering authority in this field has said:

> "Fair procedure is vital even when [the procedure] is entirely as informal as conversation. Informal procedure is not the equivalent of no procedure. For instance, before an agency makes a discretionary determination that affects a party adversely, the procedural protection is very great if the officer will tell the party what he believes the facts to be, and what he contemplates and why, and then if the officer listens to what the party has to say. The fundamentals of procedural fairness can be observed even in an informal conference * * *." 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.14 (1965 Supp.).

In fact, Professor Davis has commented directly upon the decision of the District Court in this case. While he adheres to the view that an informal procedure, such as a conference, is preferable in these circumstances to a trial-type hearing—a view with which I agree—he is nevertheless critical of the procedure followed by the Comptroller in the instant case. He states:

> "But even if a conference method is used, the basic principle of fairness that each party should be entitled to know the materials on the other side may still be applicable.

> "The Comptroller had little or nothing to gain by denying the existing bank a chance to see the application, the supporting data, the report of the Regional Bank Examiner, and the Comptroller's decision." 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.04 (1965 Supp.).

If the Comptroller wishes to continue to use informal proceedings to deal with branch applications he must make sure that the proceedings are fair. Banks potentially affected, which desire to contest an application, should be permitted reasonable access to relevant materials and an opportunity to have their say, if only informally. I would remand the case to the District Court for its return to the Comptroller with instructions to make available to the plaintiff the requested information. Thereafter a conference should be held at which the Smithfield bank may articulate its opposition. Such disposition of the case is preferable to the so-called hearing *de novo* in court which the majority orders. An informed conference before the Comptroller would not only be more just to the complaining bank but would tend less to disrupt the orderly conduct of the Comptroller's office.[1]

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[1] The Comptroller has called our attention to the recent case of Continental Bank v. National City Bank (N.D. Ohio, Civil No. C-65-484, August 20, 1965). Its relevance to the instant case is sharply diminished by the fact that it deals only with the question of whether a full-blown, trial-type hearing by the Comptroller was required. While the court refused to order such a hearing, it is noteworthy, as the court pointed out, that the objecting bank was afforded an opportunity to present pertinent information to the Comptroller, and that the Comptroller himself argued that the written application of the national bank would have been made available to the objecting bank had a request been made.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

JAMES J. SAXON,
COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on November 18, 1965.

OPINIONS BELOW

The court of appeals issued no opinion other than its judgment (App. A, *infra*, pp. 14–15), which is unreported. The opinion of the district court (App. B, *infra*, pp. 16–25) is reported at 236 F. Supp. 457.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1965 (App. A, *infra*, pp. 14–15). On February 16, 1966, Mr. Justice Fortas extended the

time for filing a petition for certiorari to and including March 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in authorizing the establishment of a branch office by a national bank, the Comptroller of the Currency is bound by a provision of State law that permits a State bank to establish a branch only through the acquisition of an existing bank.

STATUTES INVOLVED

The statutes involved are 12 U.S.C. 36(c) and Utah Code Ann. (1953), § 7–3–6. They are printed in App. C, *infra*, pp. 26–28.

STATEMENT

The law of Utah authorizes State-chartered banks to establish branch offices within the corporate limits of any city or town in the State; but, except in cities of the "first class" (of which the only one is Salt Lake City), a State bank may do so only by taking over an existing bank if there is one located there.[1] Utah Code Ann. (1953), § 7–3–6. Although more than 140,000 people reside in the metropolitan area of Ogden, Utah, the population of the city itself is approximately 70,000, and it is therefore classified under Utah law (Utah Code Ann. (1953), § 10–1–1) as a city of the "second class."

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[1] Where a city or town has branch banking offices, but no principal office of a bank, the "take over" restriction is inapplicable, and new branches may be established there without restriction. *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 390 P. 2d 592.

On or about June 25, 1963, First Security Bank of Utah, a national banking association (hereinafter referred to as the "national bank"), filed an application with the Comptroller of the Currency for authorization pursuant to 12 U.S.C. 36(c) to establish and operate a branch bank within the corporate limits of the City of Ogden, where the bank maintains its principal office. The bank proposed to establish the new branch by opening a new office rather than by purchasing or otherwise taking over an existing bank. On July 18, 1963, Commercial Security Bank (hereinafter referred to as the "State bank"), a Utah banking corporation having its principal place of business plus a branch in Ogden, commenced this action against the Comptroller of the Currency for declaratory and injunctive relief.[2] The State bank alleged that the establishment of the proposed national-bank branch in Ogden would reduce its business and profits and was prohibited by the "take over" provision of Utah bank branching law, which, it contended, is applicable to national banks by virtue of 12 U.S.C. 36(c); that statute permits a national bank (with the Comptroller's approval) to establish branches (1) in the city or town where its main office is located if State law expressly authorizes State banks to do so, and (2) elsewhere in the State if State law so authorizes State banks, and subject to the restrictions on location

[2] On June 9, 1965, the Comptroller informally approved the national bank application, but, owing to the pendency of this action, no certificate was issued.

imposed by State law.[3] The national bank intervened as a party defendant.

On December 18, 1964, the district court issued an opinion and order holding that all restrictions imposed by State law on branch banking are applicable to national banks and enjoining the Comptroller from authorizing the national bank to open a branch office in Ogden (App. B, *infra*, pp. 16–25).[4] The national bank and the Comptroller appealed. The court of appeals, without opinion, affirmed the district court's decision on the authority of *Walker Bank & Trust Co.* v. *Saxon*, 352 F. 2d 90 (C.A. 10), a recent decision also involving the application of a national bank to open a branch office in a Utah city not of the first class.[5] The Tenth Circuit had ruled in that case that "all the state law on branch banking," including the "take over" restriction of Utah law, had been made

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[3] The subsection directly relevant here is § 36(c)(1), which governs "inside" branches—those located within the city where the bank has its principal office, which for the national bank in this case is Ogden. Section 36(c)(2), which governs outside branches, provides that a national bank may, with the Comptroller's approval, establish and operate a branch "at any point within the State" where it is located "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

[4] Initially, the court held that the State bank had standing to bring this action. The Comptroller does not here question that ruling.

[5] A petition for certiorari has been filed in that case by the national bank. *First National Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, No. 875, October Term, 1965. We are this day filing a memorandum in support of the petition in *Logan*.

applicable by 12 U.S.C. 36(c) to the establishment of branches by national banks in Utah.

The national bank in the instant case has filed a petition for certiorari. *First Security Bank of Utah* v. *Commercial Security Bank*, No. 1009, October Term, 1965.

REASONS FOR GRANTING THE WRIT

The Comptroller of the Currency is authorized by 12 U.S.C. 36(c) to permit national banks to establish branch offices within the limits of the city or town where the national bank is located, provided that the establishment of such a branch is expressly authorized to State banks by the law of the State. The single question in this case is whether, by virtue of this provision, the Comptroller's authority over the establishment of national-bank branches is limited by a State statute which permits State banks to establish branches throughout the State but only by taking over an existing bank. We shall briefly explain why we think the court below erred in holding that the Comptroller's authority is so limited; first, however, we suggest why the question is an important one meriting review by this Court.

1. At least twelve States besides Utah, including such important banking areas as New York, Pennsylvania, and Massachusetts, have provisions governing branch banking similar to that in suit here.[6] That is, these

[6] See Ann. Laws of Mass., C. 172, §§ 45, 46; Conn. Gen. Stat. Ann. (1958 rev.), § 36-59; 2 Ky. Rev. Stat. § 287.180; Me. Rev. Stat. (1963 Cum. Supp.), c. 59, §§ 19-c, 124; Miss. Code, §§ 5228, 5229, 5232; N.H. Rev. Stat. Ann. (1965 Supp.), 384-B:2; N.J. Stat. Ann., § 17:9A-19; 4 McKinney's Consol. Laws of N.Y.

States authorize banks chartered by them to establish branch offices but (at least in some circumstances) only by acquiring existing banks. If the decision below stands, therefore, in all of these States the Comptroller of the Currency will be barred from approving the establishment of national-bank branches save through acquisition.[7] And not only is the impact of the decision below likely to be widespread in terms of the number of States affected, but, within each of these States, the structure of banking competition will be profoundly affected. The State-law provisions in question are highly anticompetitive. By freely permitting branching by acquisition, they foster the development of large and powerful banks with numerous offices throughout the State; at the same time, by forbidding branching through the establishment of new offices, they strictly limit the number of competitors in each local banking market.[8] The inevitable tendency is to promote concentration and weaken competition. If this pattern is obligatory upon the national as well as the State banks within each of these States, its adverse competitive effects will be greatly magnified.

Ann., §§ 105, 600, 601–a; Purdon's Pa. Stat. Ann., Tit. 7, § 819.204.1; S.D. Code of 1939 (1960 Supp.), § 6.0402; Code of Va., Tit. 6, Art. 3, Sec. 6–26 (1964 Cum. Supp.); Rev. Code of Wash. Ann. § 30.40.020.

[7] We point out *infra*, p. 7 and n. 10, that, in principle, the decision below is in conflict with that of another circuit. Since, however, any State bank challenging the Comptroller's authorization of a national bank branch may sue the Comptroller in the District of Columbia (see 28 U.S.C. 1391(e)(1)), it is evident that a further conflict with the decision below is unlikely to arise and that the decision—unless reversed—will, for all practical purposes, be binding in all of the States which have a similar restriction.

[8] See, further, p. 10, *infra*.

The general question involved in this case—the extent to which State-imposed branching limitations are made applicable by 12 U.S.C. 36(c) to the national banks—has been extensively litigated in recent years;[9] lacking guidance from this Court (which has never had occasion to consider the scope of § 36(c)), the lower federal courts have reached sharply conflicting results. Thus, the Fourth Circuit in a recent case adopted a view—completely at variance with that of the Tenth and District of Columbia Circuits—that only geographic restrictions are incorporated in § 36(c). *First National Bank of Smithfield, North Carolina* v. *Saxon,* 352 F. 2d 267 (C.A. 4); accord, *Attorney General* v. *Michigan National Bank,* 298 Mich. 417, 299 N.W. 129.[10] The conflict and uncertainty that have developed in the interpretation of this important fed-

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[9] Besides the cases cited herein, see, *e.g.*, *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830; *Hoosier State Bank* v. *Saxon*, Civ. No. 4111, N.D. Ill., Dec. 14, 1965.

[10] In *Smithfield*, a competing bank challenged the Comptroller's authorization of the establishment by a national bank of a branch outside its home municipality under 12 U.S.C. 36(c)(2) (see p. 4, n. 3, *supra*). The bank contended that Section 36(c) incorporates all of the requirements of State law as to branching, and, hence, that the Comptroller was required to ascertain "to his satisfaction * * * that the establishment of such [branch] * * * will meet the needs and promote the convenience of the community," since the law of the State in question (North Carolina) requires the State banking commissioner to make such in determination before approving any branch application. The court rejected the contention, holding that only geographic restrictions imposed by the State on branching are applicable to national banks. 352 F. 2d at 271. This reading would equally exclude from the scope of State power over national-bank branching the take-over requirement of Utah law, which is in no sense a geographical restriction on branching.

eral statute furnish an additional reason for the Court to review this case.

2. The language and design of 12 U.S.C. 36(c) support the view of the Comptroller that the only State branching limitations binding upon the Comptroller are those geographical in character.[11] If the State forbids branching altogether or confines it to specific localities (*e.g.*, the county where the bank has its head office plus adjacent counties), Section 36(c) expressly provides that the Comptroller, in authorizing the establishment of national-bank branches, is bound by the restriction. But if, as in the present case, the State permits branching in the area where the national bank desires to establish a branch, any other limitations it may impose—for example, on the manner of branching (*i.e.*, by acquisition of an existing bank rather than by opening a new office)—are not binding upon the Comptroller.

Certainly, there is no basis in the language or legislative history (see, *e.g.*, S. Rep. No. 473, 69th Cong., 1st Sess., pp. 8, 10) for the view of the Tenth and District of Columbia Circuits that "all state law on branch banking" (p. 4, *supra*) is applicable to national banks. And even if Section 36(c) incorporates by implication any State limitations on branching by national banks which go beyond the strictly geographic, we submit that Congress did not adopt a nonterritorial restriction, such as that at bar, which (1) is inconsistent with fed-

[11] This Court has described the State-law restrictions applicable to national banks as "geographical limitations." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328; *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 413, n. 1. State minimum-capitalization requirements are also expressly made binding on the Comptroller; they are not in issue here.

eral public policy in the banking field and (2) appears not even to express State policy on the permissibility of branch banking. In so arguing, we leave open the possibility that some limitations that do not appear strictly geographical may be within the scope of § 36(c) (for example, a State restriction upon the number of branches a bank may have in a particular area), in view of Congress' evident design to afford protection to State branch-banking policies. But we think the statutory language—which in terms subjects the Comptroller only to geographical restrictions imposed by State law—can in no event be stretched to embrace a restriction like the one in suit, which is neither geographic in nature, nor compatible with general federal banking policy, nor in fact an expression of State branching policy of the kind Congress wished to protect.

Federal policy strongly favors competition among banks as a method of ensuring adequate banking services, and, concomitantly, prohibits mergers or acquisitions which are likely to harm competition in banking. Thus, bank stock acquisitions, since they are fully subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, are forbidden where the effect may be "substantially to lessen competition." See *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163 (C.A. 3). In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, this Court held that the same strict test was applicable to bank mergers. In a recent amendment to the Bank Merger Act (the original Act had made "effect * * * on competition" one of several factors to be considered by the banking agencies in passing on an appli-

cation for approval to merge (12 U.S.C. 1828(c)), Congress modified the ruling of *Philadelphia Bank;* but the new law continues to subject bank mergers to a strict competitive standard, under which a merger "whose effect in any section of the country may be substantially to lessen competition" is forbidden unless its adverse competitive effects are "clearly outweighed" by considerations of public need and convenience. Pub. L. 89–356, enacted February 21, 1966, § 1, amending 12 U.S.C. 1828(c) (5) and (7). And bank holding companies are strictly regulated to ensure "the preservation of competition in the field of banking." Bank Holding Company Act of 1956, § 3(c), 12 U.S.C. 1842(c); see *First Wisconsin Bankshares Corp.* v. *Board of Governors,* 325 F. 2d 946 (C.A. 7).

The consistent and firm congressional policy against anti-competitive bank acquisitions is antithetical to the kind of branching restriction imposed by the Utah provision in suit here. By permitting banks to branch throughout the State by acquiring existing banks, Utah fosters the growth of large and powerful banks and the elimination by absorption of independent banking units, thereby promoting concentration. At the same time it largely precludes a vital antidote to concentration—new entry. *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174. Under this provision of Utah law, a State bank cannot penetrate a concentrated local banking market by establishing a branch office there. It may enter only by taking the place of one of the existing banks—a method of entry that leaves the concentrated structure of the market unchanged. If this restrictive principle is limited to banks chartered by the State, the national banks of

Utah remain as an important source of new competition. If, on the other hand, it binds the national banks as well, the adverse competitive consequences of the State restriction lack this important check. The Comptroller may either authorize branching by acquisition—which may promote concentration [12] and is unlikely to lessen it—or forbid it altogether—thereby stifling a possibly critical source of new entry. But he cannot authorize the opening of new branch offices. Entry is thus severely restricted.[13] In view of these anti-competitive consequences, it seems plain that Congress could not have intended 12 U.S.C. 36(c) to be so applied.

Our remaining ground for arguing that Utah's limitation of branching to the take-over of existing banks is not made applicable by 12 U.S.C. 36(c) to national banks is that such a limitation does not, in fact, express State policy toward the permissibility or extent of branch banking. Congress limited the branching powers of the national banks out of deference to strongly held feelings in many States against branch banking. Some States forbade it altogether; others limited it territorially; still others prescribed the maximum number of branches in a given location. In each case the State was expressing a restrictive policy toward branching. The Utah provision in issue here expresses

[12] That would be the case here. There are only four banks in Ogden, so that if the national bank were required to take over one of the existing banks, the number would be reduced to three.

[13] He can, to be sure, charter a completely new national bank. But entry into a new market by an existing banking company through the establishment of a branch office is ordinarily more feasible than the formation of a new bank. See Note, 71 Yale L.J. 502, 514–515 (1962); cf. *United States* v. *Penn-Olin Chemical Co.*, *supra*.

no such policy. It does not seek to maintain a structure of decentralized unit banking, to limit the scope of branching, or to prevent the growth of large multi-unit banks, but, rather, looks with apparent equanimity upon the spread of branch banking.[14]

Utah insists only upon a certain method of branching—by acquisition. By forbidding banks to open new branch offices, the State limits the total number of bank offices in cities that have unit banks (see p. 2, n. 1, *supra*), main and branch. This is a policy rooted in concern with the number of banking outlets in such cities, not with whether or to what extent it is desirable to permit banks to have branches. There is no indication that Congress intended that such a policy would also bind the national banks of a State. See H. Rep. No. 83, 69th Cong., 1st Sess., p. 7. On the contrary, since the Comptroller in chartering new national banks is not required to follow State law, it seems plain that Congress did not intend to subject the Comptroller to State policy with respect to the total number of bank offices, State and national, to be permitted in each State or in particular areas of the State.

In other words, the policy Congress wished to protect was the State's judgment on whether, where, and, perhaps, in what number branches were to be permitted, and not its judgment on the permissible methods or procedures of branching. Thus, a national bank clearly need not obtain the approval of the State banking commissioner before opening a branch, though

[14] For example, Walker Bank and Trust Co., the State bank involved in the *Logan* case (No. 875, this Term), has 14 branches throughout the State.

that is the procedure required of a State bank. *Attorney General* v. *Michigan National Bank, supra.* Nor, if State law requires that before approving a branch application the State banking commissioner must determine that the opening of the branch would not adversely affect the profits of existing banks, must the Comptroller of the Currency therefore make a similar determination in passing upon a national bank's application for approval to branch. Cf. *First National Bank of Smithfield, North Carolina* v. *Saxon, supra.* Essentially the same issue is presented here. The State permits branching so long as the total number of banking outlets in cities that have unit banks is not thereby increased, a limitation evidently designed to protect the profit position of existing banks. See *Walker Bank & Trust Co.* v. *Taylor,* 15 Utah 2d 234, 237, 390 P. 2d 592, 594. Since this is a limitation upon the methods or procedures of branching, rather than upon the extent to which branching should be permitted, it is not a limitation upon national banks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys.

MARCH 1966.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1965

Civil 1815–63, Filed November 18, 1965,
Nathan J. Paulson, Clerk

No. 19356

FIRST SECURITY BANK OF UTAH, N.A., APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

No. 19357

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Wright and Tamm, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed. *Walker Bank & Trust Company* v. *James*

J. Saxon, Comptroller of the Currency, et al., decided October 26, 1965, No. 7981, C.C.A. Tenth Circuit.

It is further ORDERED by the court that all parties bear their own costs on these appeals.

Per Curiam.

Dated: November 18, 1965.

APPENDIX B

United States District Court for the District of Columbia

C.A. NO. 1815–63, FILED DECEMBER 18, 1964, HARRY M. HULL, CLERK

COMMERCIAL SECURITY BANK, PLAINTIFF

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, DEFENDANT

FIRST SECURITY BANK OF UTAH, N.A., INTERVENOR-DEFENDANT

Memorandum and Order

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the "second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the

Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18, 1963, the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U.S.C.A. § 36, and an injunction to restrain the Comptroller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, on July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

> * * * that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction * * * that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction.

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit. The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its business and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company,* 323 F. 2d 290, 300 (C.A.D.C., 1963), cert. granted 376 U.S. 948:

> The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra,* at page 300, the Court stated, "* * * there is no discretion to unlawfully issue a certificate.", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U.S.C. § 36(c) (1927, as amended), which provides:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;* * * * [Emphasis supplied.]

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

> Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.* [Emphasis supplied.]

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank

would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would clearly have been denied.[1] The question before this Court, therefore, has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

The defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was "* * * the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches" (at

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[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co.* v. *Taylor*, 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

p. 775). Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, recently held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defendant national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish a new branch. The *Commercial Bank of Roseville* case, *supra,* as well as other cases emphasizing the controlling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels im-

pelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that, in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21–213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states at that time did allow branching, however, and as a result, the competitive situation was so imbalanced

[2] 12 U.S.C.A. §§ 36(c), 51, 85, 92a(a), and 214c.

that the Comptroller in his 1924 report (Government Printing Office), stated, at page 4:

> The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system.

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c) (1933, as amended) set out below:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: * * * (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks * * *.

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra*, that it is bound to hold that the exact standards of the Utah branching law must be applied to the First Security Bank of Utah, N.A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Currency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets, Ogden, Utah, would constitute a violation of 12 U.S.C.A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

ORDERED, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

ORDERED, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

ORDERED, that the Motion for Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

IT IS FURTHER ORDERED, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N. A., which is the subject matter of this cause of action.

LEONARD P. WALSH,
Judge.

APPENDIX C

United States Code, Title 12, Sec. 36(c), as amended, provides:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing busines incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preced-

ing sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

Utah Code Annotated, 1953, Sec. 7–3–6, as amended, provides:

7–3–6. Business conducted at banking house—Branching of offices—Violation of section a misdemeanor.—The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point

where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

The term "branch" as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may reasonably require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the county in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, state the reasons therefor, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the establishment of such branch or office designate and limit the character of work and service which may therein be performed.

No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.

Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 73

FIRST SECURITY BANK OF UTAH,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

No. 1[redacted] 88

JAMES J. SAXON,
Comptroller of the Currency,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Petitions for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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April 15, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1009

FIRST SECURITY BANK OF UTAH,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

No. 1126

JAMES J. SAXON,
Comptroller of the Currency,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Petitions for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (App. B. of Petition in No. 1126) is reported at 236 F. Supp. 457. The judgment of the court of appeals (App. A of Petition in No. 1126) affirming the decision of the district court is unreported. The opinion of the Tenth Circuit in *Walker Bank & Trust Co.* v. *Saxon* relied on by the court of appeals is reported at 352 F.2d 90 and is included herein at Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTION PRESENTED

Whether, pursuant to Section 36(c) of the National Bank Act, the Comptroller of the Currency may authorize a national bank to establish a de novo branch in a city when state law would prohibit a similarly situated state bank from establishing such a branch.

STATUTES INVOLVED

The pertinent provisions of the National Bank Act (12 U.S.C. § 36(c)) and the Utah Code Annotated (§ 7-3-6) are set forth in Appendix C of the Petition in No. 1126.

STATEMENT

Section 36(c) of the National Bank Act (12 U.S.C. § 36(c)) provides, in relevant part, that

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) within the limits of the city, town or village in which such establishment is situated, if such establishment, and operation are

at the time expressly authorized to State banks by the law of the State in question. . . ."

Section 7-3-6 of the Utah Code Annotated provides, in relevant part, that

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The City of Ogden is, under Utah law, a city of the "second class" and is not located "in a county in which a city of the first class is located". First Security Bank of Utah, a national banking association, has its main office in the City of Ogden as do two state banks—the Bank of Utah and the Bank of Ben Lomand.[1] Accordingly, a state bank is prohibited under state law from establishing a de novo branch in the City of Ogden, Utah.

On June 25, 1963, First Security Bank of Utah (hereinafter called the "national bank") applied, to the Comptroller of the Currency (hereinafter called the "Comptroller") for permission to establish a de novo branch in the City of Ogden, Utah.

On July 18, 1963, respondent, Commercial Security Bank, brought suit against the Comptroller in the United States District Court for the District of Columbia seeking

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[1] In addition, both the national bank and respondent, Commercial Security Bank, each have a branch in Ogden established prior to the existing provisions of Utah branch law relevant to this case.

declaratory and injunctive relief. On July 19, 1963, the court issued a temporary restraining order prohibiting the Comptroller from approving the national bank's application to establish the proposed branch. Pursuant to a stipulation, hearing on the motion for preliminary injunction was postponed indefinitely.

On June 9, 1964, the Comptroller notified the national bank that its application was approved.[2] Subsequently the matter was heard before the district court on the Comptroller's motion to dismiss or for summary judgment and respondent's cross-motion for summary judgment.

On December 18, 1964, the district court (Youngdahl, J.) issued its decision enjoining the Comptroller from issuing a certificate approving the proposed branch. The court held that where a state bank would, by state law, be forbidden to establish a de novo branch bank, a national bank is similarly precluded by Section 36(c) of the National Bank Act from establishing such a branch. 236 F. Supp. 457 and Appendix B of Petition in No. 1126.

On November 18, 1965, the United States Court of Appeals for the District of Columbia Circuit entered its judgment affirming the decision of the district court. The court of appeals relied on a decision of the Tenth Circuit issued October 26, 1965, in *Walker Bank and Trust Co.* v. *Saxon*, 352 F.2d 90. This decision by the Tenth Circuit involved almost identical facts and the same Utah statutory provisions.[3] Neither the national bank nor the Comptroller sought a rehearing en banc of the decision below or of the decision of the Tenth Circuit.

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[2] The same day the national bank was allowed to intervene in the suit as a party defendant.

[3] A petition for certiorari in that case is presently pending before this Court. *First Nat'l Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, No. 875 (Oct. Term 1965).

On February 11, 1966, First Security Bank filed a petition for a writ of certiorari in this case (No. 1009). On March 16, 1966, the Comptroller filed a similar petition (No. 1126).

ARGUMENT

I. The General Question Involved In This Case Has Been Extensively Litigated In Recent Years And The Decisions Of The Lower Federal Courts In Nine Circuits Are In Complete Accord.

The Comptroller states that the "general question, involved in this case . . . has been extensively litigated in recent years" and "the lower federal courts have reached sharply conflicting results" (Comptroller's Petition, p. 7). Section 36(c) of the National Bank Act has indeed been the subject of extensive litigation in recent years. However respondent completely disagrees with the petitioners' statement that the federal courts have reached "conflicting results".

The precise question presented to this Court has been argued to two United States courts of appeals.[4] Both the Tenth Circuit and the D.C. Circuit have *unanimously* rejected petitioners' arguments. In addition, the general question of whether the Comptroller of the Currency is or is not bound by state law in the establishment of branches has been considered in nine circuits. These decisions are unanimous in either establishing or following the proposition that Congress intended in Section 36(c) of the National Bank Act to establish competitive equality between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks:

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[4] Judges Bazelon, Wright and Tamm of the D.C. Circuit; Judges Phillips, Pickett and Hill of the Tenth Circuit.

District of Columbia Circuit

First Security Bank of Utah, N.A. v. *Commercial Security Bank*, No. 19356, Nov. 18, 1965, affirming,

Commercial Security Bank v. *Saxon*, 236 F. Supp. 457, 461 (D.D.C. 1964);

> "If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met."

Union Savings Bank of Patchogue v. *Saxon*, 118 U.S. App.D.C. 296, 335 F.2d 718 (1964);

Gidney v. *Commercial State Bank of Roseville*, 108 U.S.App.D.C. 37, 278 F.2d 871 (1960) (per curiam), affirming,

Commercial State Bank of Roseville v. *Gidney*, 174 F. Supp. 770, 774 (D.D.C. 1959);

> "Branch banking (banking operations at other than the principal office) by national banks is regulated by state law because Congress has so provided. That is, Congress has adopted state law on the establishment of branches by state banks as the measuring stick for the establishment of branches by national banks. 12 U.S.C.A. 36(c)."

Third Circuit

Suburban Trust Co. v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963).

Bank of Sussex County v. *Saxon*, No. C.A. 568-65, Feb. 16, 1966 (D.N.J.).

Fourth Circuit

First National Bank of Smithfield v. *Saxon*, 352 F.2d 267 (1965). (see discussion below)

Fifth Circuit

Jackson v. *First National Bank of Valdosta*, 349 F.2d 71, 74 (1965).

> "We start with the proposition that the source of First National's authority to open up the disputed drive-in window must be found in Section 36(c) of the National Bank Act. That statute is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and in South Dakota, supra, at 846, that Congress did not have to give effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system."[5]

Sixth Circuit

National Bank of Detroit v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir. 1958), *cert. denied*, 358 U.S. 830;

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank."

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[5] The reference to *South Dakota* is to *South Dakota* v. *National Bank of South Dakota, infra*. The reference to the "policy of equalization" no doubt came from the opinion of this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). (See p. 12 *infra*).

Bank of Dearborn v. *Saxon*, 244 F. Supp. 394, 401 (E.D.Mich. 1965);

> "It will be observed in the above statutory enactment that the law of the state involved is to be determinative as to the problem of branching. National Banks were given the same opportunity for branching as state banks, thus perpetuating the dual banking system."

Peoples Bank-Trenton v. *Saxon*, 244 F. Supp. 389 (E.D. Mich. 1965)

Seventh Circuit

Hoosier State Bank of Indiana v. *Saxon*, 248 F. Supp. 233 (N.D.Ind. 1965).

Eighth Circuit

South Dakota v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (1964), *cert. denied*, 379 U.S. 970 (1965);

> "Under 12 U.S.C.A. § 36(c), state law is adopted by the federal government and made the measuring stick by which it is determined whether national banks may establish branches." 219 F. Supp. 846.

Ninth Circuit

State Chartered Banks in Washington v. *Peoples National Bank of Washington*, No. 6338, Feb. 28, 1966 (W.D.Wash).

> "The conditions upon which a national banking association may establish and operate a branch, as set forth in section 36, in effect incorporate state laws. These state laws relate to the establishment and operation of branches as authorized to state banks. Therefore, in construing federal law, the court must also construe the pertinent banking laws of the State of Washington." Slip opin. p. 15.

Tenth Circuit

Walker Bank & Trust Co. v. *Saxon*, 352 F.2d 90, 94 (10th Cir. 1965).

> "With this, our review of the history of branch banking and section 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933. . . ." [6]

Petitioners' contention that the decision of the court below is in conflict with the decision of the Fourth Circuit in *First National Bank of Smithfield* v. *Saxon* [7] is erroneous. That case involved the procedural question of whether the Comptroller was required to hold a hearing before approving the establishment of a branch of a national bank. The court held that such a hearing was not necessary.[8]

In the course of its opinion the court also stated that national banks are not required to obtain a state bank supervisor's approval of whether there is a "need" for a

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[6] This is the decision upon which the court below relied in affirming the district court.

[7] 352 F.2d 267 (4th Cir. 1965), App. C to Petition in No. 1009.

[8] "The Comptroller of the Currency's approval of the establishment of a branch of a national bank is ex facie invalid, the District Court has held, if it is issued by the Comptroller without a hearing conforming to the requirements of the Administrative Procedure Act. In this view we think the Court was mistaken. Throughout it must be remembered that we are not deciding whether it would be advisable or more equitable for the Comptroller to grant a hearing. We are deciding . . . only that the law does not require it." (Footnotes omitted). 352 F.2d at 268, 269.

national bank branch. This statement is not only completely consistent with the holding of the court below, and of the *Walker Bank* case in the Tenth Circuit, but is one with which respondent completely agrees. Obviously, Section 36(c) only incorporates the provisions of state statutes setting forth specific restrictions, and not state regulations, rules, or practice requiring the exercise of administrative discretion by a state official.[9]

The results of the foregoing analysis demonstrate that

(1) Two courts of appeals, faced with identical facts and considering the same state statute, have unanimously decided against petitioners' contentions;

(2) Courts in nine circuits have considered the general question of branching by national banks and have unanimously held that the Comptroller is bound by the provisions of state statutes setting forth restrictions applicable to the establishment of branches by state banks; and

(3) Petitioners cite one federal decision as purportedly conflicting with these unanimous holdings. As noted above, the dicta relied upon in that case is in complete accord with the challenged decisions. There is no other holding to the contrary.

II. The Decision Of The Court Below Was Clearly Correct.

The statutes of the fifty states relating to branching by state banks vary widely. (Appendix B) They reflect the particular needs of each state relative to their differing economies as well as divergent philosophies of the degree of protection which should be afforded small unit banks throughout the state from branches of large city banks. Thus some sixteen states prohibit all branching. Eleven

[9] The Michigan Supreme Court case relied upon by petitioner, *Attorney General* v. *Michigan National Bank*, 298 Mich. 417, 299 N. W. 129 (1941), may be similarly distinguished.

other states permit unlimited state-wide branching. The remaining twenty-three states permit branches with widely varying restrictions in an effort to tailor branching requirements to the varying economic conditions within the state itself.[10] Utah is an example of the latter category. It permits de novo branches in the larger cities of the state, but prohibits such branches in the smaller cities if there is already any state or national bank providing a banking service there. The only way in which a bank may establish an additional banking office in a smaller city in which there is a unit bank already in operation is to merge with the unit bank and to continue to operate the office of the merged bank as a branch. In this respect the provisions of the Utah statute are similar to those of twelve other states. (Appendix C).

The existence of such a multiplicity of varying state branch laws creates a very practical problem. It is obvious that without competitive equality in such an important area as the right to branch between state banks, chartered by the states, and national banks, chartered by the Comptroller of the Currency under authority delegated by Congress in the National Bank Act, the "dual banking system" of national and state banks operating side by side could not long survive. In recognition of this fact, Congress established a policy of equalization between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks under Section 36(c) of the National Bank Act. 44 Stat. 1228-1229 (1927), as amended, 12 U.S.C. § 36(c) (1965 Supp.). Both when

[10] Branches may be confined (a) to the city and/or county of the head office and/or contiguous countries; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range. In addition, some statutes provide that no branch may be established in a designated area where there is already a main office or branch of a state or national bank.

Congress permitted a national bank to establish a branch in the city in which the bank's home office is located in the McFadden Act of 1927 (now Section 36(c)(1) of the National Bank Act) and later when it permitted national banks to establish branches outside of the city in which the bank's home office is located in the Banking Act of 1933 (now Section 36(c)(2) of the National Bank Act), Congress established state law on branching as the standard for the branches of national banks. That Congress intended to establish such competitive equality between state and national banks in the matter of branching clearly emerges from a study of the legislative history of Section 36(c)(1), see *Walker Bank & Trust Co.* v. *Saxon*, 352 F.2d 90 (10th Cir. 1965),[11] and of Section 36(c)(2), see *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830. This fact is reflected in the decisions in nine circuits as set forth above. See also, the opinion of Mr. Justice Brandeis in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 564, 565 (1934) citing both Sections 36(c)(1) and 36(c)(2) as examples of the "policy of equalization" established in the National Bank Act.

The construction given to Section 36(c)(1) of the National Bank Act by the incumbent Comptroller of the Currency, without any cited administrative or judicial precedent during the thirty-eight years this provision has been in the law, is absolutely irreconcilable with the policy of equalization established by Congress in the matter of branching by national and state banks. It destroys competitive equality in branching not only in Utah, but in the twelve other states with similar statutes. (Appendix C). State banks are prohibited from establishing de novo branches in any city of the "second class" in Utah where there is an existing banking facility. Their sole right to

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[11] See also, *Commercial Security Bank* v. *Saxon*, 236 F.Supp. 457 (D.D.C. 1964), *aff'd*, No. 19356, Nov. 18, 1965 (D.C. Cir.).

branch in such locations is to take over a unit bank which is then in operation and continue to operate the banking office of the merged banks as a branch. Nevertheless, the Comptroller has authorized a national bank to establish a de novo branch in Ogden which is prohibited to state banks. It is impossible to argue, and we do not understand the petitioners to argue, that an unlimited right to establish de novo branches is competitively "equal" with a right to continue to operate the offices of a merging bank as a branch. Therefore, the only way in which Congressional intent to insure competitive equality between national and state banks in the matter of branching can be maintained in this case is by a construction of Section 36(c) and of the Utah statutes which prohibits de novo branching by both national and state banks in the City of Ogden. That is the holding of the court below and of the *Walker Bank* case decided by the Tenth Circuit.

Petitioners argue that these decisions are allegedly wrong on two counts.

First, they argue that the only branching limitations in Section 36(c)(1) binding on the Comptroller are "geographical in character", and that the applicable provision in Utah law does not meet that characterization. This argument, insofar as respondent understands it, relates to the phrase "and subject to the restrictions as to location imposed by the law of the State banks" in subdivision (2) of Section 36(c) of the National Bank Act which petitioners read into subdivision (1) of Section 36(c), the applicable provision here. In its essence the argument is an unwarranted play on words. A provision, such as that contained in the Utah branch statute, prohibiting a de novo branch at a location where there are existing banking offices is just as much as a "restriction as to location", as is a branch statute prohibiting a branch more

than 10 miles from the head office. Both provisions specify a *location* at or in which *branching* is restricted.[12]

Secondly, petitioners attempt to assert error in the decision of the court below, and of the Tenth Circuit in *Walker Bank* by an injection of anti-trust considerations. In doing so they have missed the whole point of Section 36(c). Congress, *if* it wished to do so, could have barred the applicability of state law to the establishment of branches of national banks, and could have decided that national banks could establish branches anywhere in a state. Presumably, according to petitioner's anti-trust views, that is what Congress should have done. But Congress did *not* do so. It *deliberately* established state law as the standard for branches of National banks in order to maintain a policy of equalization in the matter of branching by state and national banks. Thus petitioners' argument falls as a completely unsupportable frontal attack on the policy of equalization, between state and national banks in the matter of branching, established by Congress in the McFadden Act of 1927 and reaffirmed in the Banking Act of 1933. Surely at some time during this thirty-eight year period, *if* Congress had disapproved of the policies of the states (now 41 in number) which either prohibit or restrict branch banking, it would have lifted the requirement binding the approval of branches of national banks to state law.

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[12] The Court of Appeals for the Sixth Circuit has upheld the branching law of Michigan, which like the Utah statute here involved, prohibits branches in locations where there is an existing banking facility. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (1958). The national bank filed a petition for a writ of certiorari (October Term 1958, No. 216) contending at pp. 9-10 that Section 36(c) "encompasses only such restrictions as the state may impose as to geographic area or areas within which a State bank may establish branches", and that the Sixth Circuit was in error in "incorporating further limitations by construing it to include those provisions of State law which prescribe the number of State banks permitted to operate in a given locality." Certiorari was denied at 358 U.S. 830.

With such a clear-cut indication of Congressional intent, it is not necessary to consider petitioner's views as to whether branching restrictions are or are not anti-competitive in nature. However, respondent cannot fail to note the error in petitioner's analysis. Branching restrictions may, in fact, *promote* competition by prohibiting the expansion of large city banks all over the state to the detriment of small unit banks operating in smaller cities. Some states go so far as to prohibit all branching, thus encouraging the development of independent unit banks. Other states, with differing economies, see no danger in statewide branch banks. Many states, including Utah, take a half-way position. They state that if there are existing banking facilities in a town, there may be no increase in the number of those banking facilities *except* by the entry of a new unit bank.[13] They prohibit *de novo* branches and thereby encourage the development of new unit banks.

Petitioner's antitrust argument, therefore, reflects both a misunderstanding of competitive considerations in the matter of branching, and of the dominant theme underlying Section 36(c) of the National Bank Act: the establishment of a policy of equalization between state and national banks in the matter of branching by establishing state law as the standard for branches of national banks. The decision below was clearly correct.

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[13] A merger, with continued operation of the merged bank as a branch, does not, of course, increase the number of existing banking facilities.

CONCLUSION

For the foregoing reasons the petitions for a writ of certiorari should be denied.

Respectfully submitted,

JAMES F. BELL
BRIAN C. ELMER

Of Counsel:
POGUE & NEAL

April 15, 1966

APPENDIX A

WAIKER BANK & TRUST COMPANY,
a corporation, Appellant

v.

JAMES J. SAXON, Comptroller of the Currency, and the First National Bank of Logan, of Logan, Utah, a National banking association, Appellees

No. 7981

United States Court of Appeals
Tenth Circuit

Oct. 26, 1965

Rehearing Denied Dec. 3, 1965

Joseph S. Jones, Salt Lake City, Utah (C. E. Henderson and Ray, Rawlins, Jones & Henderson, Salt Lake City, Utah, on the brief), for appellant.

David L. Rose, Atty., Dept. of Justice (John W. Douglas, Asst. Atty. Gen., William T. Thurman, U. S. Atty., and Kathryn H. Baldwin, Atty., Dept. of Justice, on the brief), for appellee James J. Saxon, Comptroller of Currency.

Ted S. Perry, of Perry & Perry, Logan, Utah, for appellee First Nat. Bank.

Brief filed by James F. Bell, Washington, D. C., amicus curiae.*

Before PHILLIPS, PICKETT and HILL, Circuit Judges.

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* Leave was granted to the National Association of Supervisors of State Banks to file a brief in the case as amicus curiæ.

HILL, Circuit Judge.

Appellant, Walker Bank and Trust Company, brought this action in the court below against appellees, the Comptroller of the Currency and The First National Bank of Logan, to obtain a declaratory judgment decreeing the action of the Comptroller, in authorizing The First National Bank of Logan to establish and operate a branch bank in Logan, to be void and of no legal effect.

Both defendants, by separate answers, alleged the validity of the questioned action of the Comptroller and the defendant bank, in addition, raised the affirmative defenses of (1) lack of standing to sue on the part of the plaintiff, (2) estoppel, and (3) that the Utah statute governing the establishment of branch banks is unconstitutional. The trial court, by memorandum opinion, held that the action of the Comptroller was valid and therefore found it unnecessary to pass on any of the affirmative defenses raised. Appellant appealed from that decision.

The facts pertinent to this appeal may be briefly stated. Appellant is a banking corporation organized under the laws of Utah, with its main bank located in Salt Lake City and with a branch bank located in Logan. Appellee, The First National Bank of Logan, is a banking corporation organized under the National Banking Act maintaining its principal bank in Logan, a city of the second class. On January 21, 1963, the appellee, Comptroller of the Currency, after application, issued a certificate to The First National Bank of Logan, authorizing it to establish and maintain a new and separate branch bank in Logan in addition to its main bank. Our sole question pertains to the authority of the Comptroller to issue such certificate.

We must first look to the Federal and State statutes pertinent to our question. The beginning point is 12 U.S.C. § 36(c), as amended, part of which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; * * *."

(c) (2) of § 36 is set forth below [1] and covers specifically so-called "outside branches", that is branches outside the city of the parent bank. Since our facts disclose that we are only concerned with (c) (1) or "inside branches", that is a branch bank located within the same city or town as the parent, we need not pass on (c) (2). Consideration of it in this case will be confined primarily to whatever light it might shed on (c) (1).

[1] The Utah Code Ann., Title 7, Chap. 3, § 6 (1953 as amended) provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until

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[1] 12 U.S.C. § 36(c) (2) provides in pertinent part:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by [the] statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

such bank shall have been in operation as such for a period of five years."

The parties stipulated that Logan, Utah, is not a city of the first class. Therefore, it is perfectly clear that in Logan, a state bank could not establish a branch bank unless it took over an existing bank which had been in operation for five previous years. The Supreme Court of Utah in Walker Bank & Trust Co. v. Taylor, 15 Utah 2d 234, 390 P.2d 592 (1964) in construing this Utah statute in regard to Provo, Utah, which like Logan is a city of the second class, held that the only way a branch state bank could be established in a city of less than the first class having an existing unit bank is by taking over such existing bank. The obvious question then to decide is this: Does 12 U.S.C. § 36(c) (1) require the Comptroller to withhold his certificate of approval for the establishment of a national bank branch unless the branch is authorized in all respects by the law of the State in which the bank is located? The court below answered this question in the negative resting its opinion on the premise that § 36(c) (1) embodies only the requirement that inside branching be "expressly authorized" to State banks by State law without other conditions or restrictions of State law. In other words, even though a state bank in an identical situation with that presented here could not establish a branch bank, nevertheless a national bank could because state law generally sanctions branch banking. For the reasons hereinafter stated, we disagree with the trial court and hold that 12 U.S.C. § 36(c) (1) provides, as Congress intended it should, that the measuring stick of national branch banks is state law.

The history of national bank legislation spans over one hundred years. The present Act was derived from the Act of June 3, 1864, 13 Stat. 99, which was the National Bank Act. During this period, a multitude of changes in the Act have occurred as various economic problems were

encountered. The provisions of the Act affecting branch banking entered the scene in 1927. Before that time branch banking was not generally sanctioned by Congress. See First National Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486. The Court there noted that the various state laws are binding on the dealings and contracts of national banks unless and until those laws conflict with federal laws or frustrate the purpose for which national banks were created or impair their efficiency. With national banks unable to branch, state banks did branch where state law permitted placing the national banks at a considerable disadvantage in the competitive banking field. It was against this background that Congress provided for national bank branches in the McFadden Act of 1927, 44 Stat. 1224, 1228 on branch banking.[2] Congressman McFadden reported on this bill from the Committee on Banking and Currency. In the beginning, the Committee Report states, "Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have been successfully operating within recent years."[3] Later in the same report in discussing Section 8 it is stated, "This section recognizes the right of national banks to establish branches within those cities in which State banks have that privilege * * *." Finally, the report concludes in part with, "The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks." It seems clear to us at

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[2] "(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question."

[3] H.Rept.No. 83, 69th Cong., 1st Sess. (1926).

this juncture, that Congress meant in the McFadden Act to put national banks on a par with state banks insofar as branching was concerned, and to do this, they made state law controlling on the question of national bank branches. But our investigation of the history of branch banking cannot end here, for in 1932, owing to the financial crisis of those times, Congress again considered branching by national banks.

In 1932 the Senate considered a bill (Senate Bill 4412) which would allow branch banking by national banks irrespective of the various state laws. Senator Glass, the committee chairman, did point out at the time that this was a highly controversial subject.[4] The main objection the opponents had to this bill concerning the branching provision was that it would constitute an invasion of the sovereign rights of the states to establish federal banks within their boundaries not approved by local policy. Apparently at this time, most states did not approve of branch banking.[5] It was at this time that Senator Bratton[6] of New Mexico offered his amendment to the bill which as modified was finally passed. We deem Senator Bratton's comments in regard to the bill highly noteworthy when in Vol. 76, Cong. Rec. p. 1449, he indicated that under existing law a national bank may engage in branch banking if the law of the state where the national bank is situated permits state banks to do so. Then in commenting on the Glass bill he said, "It is proposed to permit national banks to engage in branch banking whether the law of the State in which a given bank is located permits it or not. It is proposed now to permit national

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[4] Cong.Rec. Vol. 75, p. 9890.

[5] See Cong.Rec. Vol. 75, pp. 9891, 13,002; Vol. 76 pp. 1449, 1997, 2079, 2080, 2090, 2205, 2206.

[6] The Honorable Sam G. Bratton later became a distinguished and highly esteemed member of this court, serving from 1933 until his retirement in 1961.

banks to disregard the sentiment of a given State with respect to that question. I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted in a given State should be determined by the State." The Bratton Amendment was then presented and adopted in the Glass bill.[7] This amendment concerning branch banking also expanded national banks into outside branches or branches outside the city or town of the parent bank. This is (c) (2) of the present section concerning such banks.

Although the Glass Bill including the Bratton Amendment passed the Senate, it failed to pass the House until the next session when the bill was passed by both houses with the Bratton Amendment intact. Two other Congressional comments made in 1933, when § 36(c) was under consideration in the Congress, one by Senator Glass[8] and

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[7] Cong.Rec. Vol. 76, p. 2205. The amendment read as follows with its amendment.

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000."

[8] Senator Glass, in Vol. 77 Cong.Rec. 3726 (1933) said:

> "There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those States which by law permit branch banking to State Banks. It went even further under the amendment of the distinguished Senator from New Mexico, and

the other by Congressman Luce,[9] support our interpretation of this statute.

[2, 3] With this, our review of the history of branch banking and § 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933 through the Bratton Amendment despite the fact that originally the Glass bill sought to change that policy. It seems to us a frustration of that policy to say as the trial court did that merely because a state in a broad general way sanctions branch banking, that is enough to permit a national branch, even though

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required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks.

"How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate."

[9] Congressman Luce stated in Cong.Rec. Vol. 77, p. 5896:

"In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail."

other vital provisions of state branching laws are not met. In other words, we believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it.[10] While we entertain no doubt of Congress' authority to regulate national banks in whatever way it deems fit, we are convinced that in this area of the law, Congress has restricted its power and acceded to state law which it may certainly do. It is clear to us that the Congress intended to create and maintain a competitive equality between state and national banks. The trial court's interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage. The Comptroller exceeded his statutory authority in the issuance of the certificate authorizing appellee bank to establish and maintain the branch bank.

We will refrain from passing on any of the affirmative defenses raised by the answer of The First National Bank of Logan because the trial court must properly be given the first opportunity to determine their merits, if any. The judgment of the trial court is reversed and the case is remanded with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent herewith.

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[10] For other cases tending to support this view although each construing § 36(c) (2) dealing with outside branches instead of (c) (1) see the following. National Bank of Detroit v. Wayne Oakland Bank, 6 Cir., 252 F.2d 537, cert. denied, 358 U.S. 830, 79 S.Ct. 50, 3 L.Ed.2d 69; State of South Dakota v. National Bank of South Dakota, D.C., 219 F.Supp. 842; Commercial State Bank of Roseville v. Gidney, D.C., 174 F.Supp. 770, aff'd per curiam, 108 U.S.App.D.C. 37, 278 F.2d 871 (1960); and see Rushton ex rel. Comr. of Bkg. Dept. v. Michigan National Bank, 298 Mich. 417, 299 N.W. 129, 136 A.L.R. 458. We also note, in a factually similar case construing (c) (1) from Utah decided by the U.S. District Court, District of Columbia, held exactly as we do here. Commercial Security Bank v. Saxon, 236 F.Supp. 457 (1964).

APPENDIX B

Summary of Branch Banking Statutes Of The 50 States

States Permitting Unlimited Branch Banking

State:

Alaska
Alaska Statutes, 1962, Sec. 06.05.415.

Arizona
Arizona Revised Stat. Anno., Sec. 6-223 (1956).

California
Calif. Financial Code Anno., Sec. 500 (1955).

Delaware
2 Del. Code Anno., Title 5, Sec. 770 (Supp. 1962).

Idaho
Idaho Code, Sec. 26-1001 (Supp. 1963).

Maryland
Anno. Code of Md. 1957, Art. 11, Sec. 65.

Nevada
Nevada Revised Stat., Sec. 660.010 (1960).

North Carolina
Gen. Stat. of N. C., Sec. 53-62 (Supp. 1963).

Rhode Island
Gen. Laws of R. I., Sec. 19-1-13 (1956).

South Carolina
Code of Laws of S. C., Sec. 8-57 (1962).

Vermont
Vermont Stat. Anno., Title 8, Sec. 501 (1958).

States Permitting Restrictive Branch Banking

State:

Alabama
Acts of 1953, 1955, 1957; Code of Alabama, Title 5, Sec. 125(1).

Connecticut
Gen. Stat. of Conn., Revision of 1958, Sec. 36-59.

Georgia
Code of Ga. Anno., Sec. 13-203.1.

Hawaii
Revised Laws of Hawaii, C. 178, Sec. 39.

Indiana
5 Burns Ind. Stat. Anno., Sec. 18-1707.

Kentucky
Ky. Revised Stat., Sec. 287.180.

Louisiana
La. Revised Stat., Sec. 6:54 (1951).

Maine
Revised Stat. of Maine, Ch. 59, Sec. 19-C (1963 Supp.); Ch. 59, Sec. 124 (1963 Supp.)

Massachusetts
Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1963 Supp.); Ch. 172 A, Sec. 12.

Michigan
Mich, Stat. Anno., Secs. 23.762, 23.762(1).

Mississippi
Miss. Code, Secs. 5228, 5229.

New Hampshire
N.H. Rev. Stat. Anno., Sec. 384-B:2 (1963 Supp.).

New Jersey
N.J. Stat. Anno., Sec. 17:9A-19.

New Mexico
N.M. Stat. Anno., Sec. 48-2-17.

New York
Book 4, Banking Law, Sec. 105.

Ohio
Page's Ohio Revised Code Anno., Title 11, Sec. 1103.09.

Oregon
Oregon Rev. Stat., Sec. 714.050.

Pennsylvania
Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1.

South Dakota
S.D. Code of 1939, Sec. 6.0402.

Tennessee
Tenn. Code Anno., Sec. 45-211.

Utah
Utah Code Anno., Sec. 7-3-6 (Supp. 1963).

Virginia
Code of Va., Title 6, Art. 3, Sec. 6-26.

Washington
Revised Code of Wash. Anno., Sec. 30.40.020 (1961).

States Prohibiting All Branch Banking

States:

Arkansas *
Ark. Stat. 1947 Anno., 1963 Supp., Sec. 67:205; Sec. 67-340-342.

Colorado
Colo. Revised Stat., 1960 Perm. Supp., Sec. 14-13-1.

Florida
Fla. Stat. Anno., Sec. 659.06.

Illinois
Smith-Hurd Ill. Anno. Stat., Ch. 16½, Sec. 106.

Iowa *
Ia. Code Anno., Sec. 528.51.

Kansas *
Gen. Stat. of Kansas Anno., Sec. 9-1111 (1961 Supp.).

Minnesota
Min. Stat. Anno., Sec. 48-34.

Missouri *
Vernon's Anno., Mo. Stat., Sec. 362.105, Sec. 362.107.

Montana *
Revised Codes of Mont. Anno., Sec. 5-1028 (1963 Supp.).

Nebraska *
Revised Stat. of Neb., Sec. 8-1, 105.

North Dakota *
N.D. Revised Code, Sec. 6-03-14.

Oklahoma *
Okla. Stat. Anno., Title 6, Ch. 19, Sec. 461 (1963 Supp.).

Texas
Vernon's Civil Stat. of Texas Anno., Art. 342-903.

West Virginia
W. Va. Code Anno., Sec. 3131.

Wisconsin *
West's Wisc. Stat. Anno., Sec. 221.04.

States With No Legislation Authorizing Branch Banking

States:

Wyoming

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* These states permit certain offices with limited powers only. Arkansas permits a branch under one very limited circumstance.

APPENDIX C

Summary Of State Laws Which, Like the Utah Statute Involved In This Case:

(1) *Restrict De Novo Branch Banking in Certain Locations Dependent Upon Whether There Are Existing Banking Offices At Such Locations, But*

(2) *Nevertheless Permit State Banks To Acquire A Branch By Merger At Such Restricted Locations*

State:

Connecticut
Gen. Stat. of Conn., Revision of 1958, Title 36, Sec. 59

Kentucky
Ky. Revised Stat., Vol. II, Sec. 287.80

Maine
Revised Stat. of Maine Ch. 59, Sec. 19-C (1963 Supp.); Ch. 59, Sec. 124 (1963 Supp.)

Massachusetts
Mass. Gen. Laws Anno. Ch. 172, Sec. 11

Mississippi
Miss. Code, Sec. 5228, 5229, 5232

New Hampshire
N.H. Rev. Stats. Anno., Ch. 384 B:2 (1963)

New Jersey
N.J. Stat. Anno., Sec. 17:9A-19

New York
Book 4, McKinney's Consol. Laws of New York Anno., Sec. 105, Sec. 600, Sec. 601-a

Oregon
Oregon Rev. Stat., Sec. 714.054

Pennsylvania
Purdon's Pa. Stat. Anno., Title 7, Sec. 819.204.1

South Dakota
S.D. Code of 1939 (1960 Supp.), Sec., 6.0402

Washington
Revised Code of Wash., Sec. 30.40.020

Note 1: Virginia, Code of Va., Title 6, Sec. 6-26, restricts branching to intra-city without the number-of-banks restriction. It permits branching outside the city by merger.

Note 2: Appellee has found it difficult to trace each of the foregoing statutes to the original enactment date of the provisions embodying *both* of the provisions set forth in the caption to this Appendix. It sets forth here, however, the earliest date which it was able to find with the belief that in certain instances the origin dates are earlier than those listed: Connecticut (1947); Kentucky (1954); Maine (1961); Massachusetts (1928); Mississippi (1934); New Hampshire (1963); New Jersey (1948); New York (1961); Oregon (1963); Pennsylvania (1955); South Dakota (1933); Washington (1933); Virginia (1962).

Note 3: The present provisions of the Utah statute were basically enacted on March 7, 1951. Prior to that time the provisions of the Utah Code Anno. (1943), Sec. 7-3-6, authorized branches in cities other than the first class upon obtaining consent of all banks located therein. For further legislative history of the Utah statute, see *Walker Bank & Trust Co.* v. *Taylor*, 15 U.2d 234, 236-7, 390 P.2d 592, 594-5 (1964).

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IN THE SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, A National Banking Association,
Petitioner

vs.

WALKER BANK & TRUST CO. a corporation,
Respondent

October Term 1965
No. [redacted] 51

BRIEF OF PETITIONER

The First National Bank of Logan

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Logan, Utah
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IN THE SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, A National Banking Association,
Petitioner

vs.

WALKER BANK & TRUST CO. a corporation,
Respondent

October Term 1965

No. 875

BRIEF OF PETITIONER
The First National Bank of Logan

OPINION BELOW

The opinion of the District Court for Northern District of Utah is reported at 234 F. Supp. 74.

The opinion of the Court of Appeals for the Tenth Circuit is reported at 352 F. 2d 90.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit in the above case was made and entered on October 26, 1965. The First National Bank's petition for rehearing was denied on December 3, 1965. The petition for certiorari was filed January 4, 1966 and was granted May 2, 1966.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code, Section 1254 (1). [As to time see 28 U. S. C. Section 2101 (c).]

STATUTES AND FEDERAL RULES INVOLVED

Question No. 1:

United States Code, Title 28:

Section 1331 (p. 5019), 72 Stat. 415:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Rules of Civil Procedure, Rule 12 (h) (p.5138):

(2) that, wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Question No. 2:

United States Code, Title 12:

Section 36 (p.2068), 76 Stat. 667:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely

by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than equal amount of capital stock.

Section 7-3-6, Utah Code Annotated, 1953:

Business conducted at banking house — Branching of offices—Violation of section a misdeameanor. The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

The term "branch" as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may reasonably require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the county in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, state the reasons therefor, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the estab-

lishment of such branch or office designate and limit the character of work and service which may therein be performed.

No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.

Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

QUESTIONS PRESENTED

Respondent, Walker Bank and Trust Company, of Salt Lake City, Utah, brought action to have the Certificate of Authority granted by the Comptroller of the Currency to The First National Bank of Logan to operate a branch in Logan, Utah, declared illegal because The First National Bank did not take over an existing unit bank in establishing its branch (even though there was no other unit bank in Logan, Utah, The First National Bank could take over) as provided in the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953, which provision Walker Bank claims is incorporated in Title 12, United States Code, Section 36 (c). Walker Bank also seeks an injunction enjoining The First National Bank from continuing to operate its branch. Walker Bank alleged it would be irreparably injured and damaged in excess of $10,000 if the injunction was not issued, which allegations were denied by the defendants. Walker Bank presented no evidence to the District Court that it had been or would be damaged by the continued operation of the branch. The District Court nevertheless denied The First National Bank's motion to dismiss because of failure to show jurisdiction as there was no showing that the amount in controversy exceeded $10,000, but the District Court did dismiss the complaint of Walker Bank on the grounds that the Comptroller was within his statutory

authority in authorizing the branch. On appeal to The Court of Appeals for the Tenth Circuit, the decision of the District Court was reversed on the merits, but was silent as to the question of jurisdiction raised by The First National Bank. The questions presented are:

1. *Does a Federal District Court have jurisdiction to hear a complaint by a state bank that a national bank's intra-city branch was illegally established and asking that its continued operation be enjoined where there was no showing that the amount in controversy exceeded $10,000 as the state bank presented no evidence that there was or would be damage to the state bank's business by the continued operation of the national bank's branch, and the defendant national bank's pleading denied that the state bank would be damaged?*

If the question is answered in the negative the second question need not be answered. If it is answered in the affirmative then the following question remains:

2. *Whether Congress in the National Banking Act, 12 U. S. C. Section 36 (c) intended that national banks are subject to the identical restrictions of state law as state banks in establishing a branch within the limits of their own community?*

STATEMENT OF THE CASE

Defendant, The First National Bank of 99 North Main Street, Logan, Utah, applied to the Comptroller of the Currency for permission to establish a branch at 466 North Main Street in Logan, Utah, on November 9, 1962. Prior to that time the defendant bank had no branch. The defendant bank did not seek to take over an existing bank because there was no other bank, other than branches, situated in Logan. The plaintiff, Walker Bank & Trust Company of Salt Lake City,

Utah, a state bank, and The First Security Bank of Utah, of Ogden, Utah, a national bank were at the time and are now operating branches in Logan, Utah (R. 13).

The Comptroller requested John Wanless, Jr., a national bank examiner, to investigate defendant bank's application and in the course of his investigation between November 27 and 29, 1962, he advised Reed Holt, President of Walker Bank, the plaintiff, of the application (R. 17). But Walker Bank took no action thereon. The Comptroller approved the application on January 17, 1963, and on January 21, 1963, the Comptroller issued his certificate of authority granting permission to The First National Bank to establish a branch bank on North Main Street in Logan, Utah (R. 13). On the same day The First National Bank established a branch and it has continued to operate since said time.

On July 9, 1963, plaintiff, Walker Bank, commenced this action and asked for a judgment declaring that the authorization of the Comptroller for a branch was prohibited by Title 12, United States Code, Section 36 (c) and for an order compelling the Comptroller to rescind the certificate and restraining the defendant bank from establishing or operating a branch bank in the City of Logan. The plaintiff claimed that even though Utah's law authorizes branch banking, the defendant national bank had not taken over another bank as provided by state law, even though there was no other unit bank in Logan The First National Bank could take over (R. 1-4).

Walker Bank alleged in its complaint the basis for jurisdiction of the Federal District Court as required by Rule 8 (a) (1) of the Rules of Civil Procedure, Title 28, United States Code as follows:

> "This action arises under Section 36 of Title 12 of the United States Code commonly referred to as the National

Banking Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah and in the said City of Logan where it has a large investment in capital, property, equipment and good will and irreparable damage will be sustained by plaintiff unless the relief herein prayed for is granted. The amount in controversy exceeds, exclusive of interest and costs the sum of $10,000" (R. 1-2).

In paragraphs 1 and 7 of its third defense the defendant First National Bank denied the allegation above set forth and in said paragraph 1 not only denied that Walker Bank would be damaged but alleged that it would be benefited by defendant bank's branch:

> "This defendant denies that irreparable damages will be sustained by plaintiff unless said relief is granted and alleges that no damage will be sustained by plaintiff, in fact, under a National Emergency plaintiff may be benefitted by the establishment of a new branch bank of this defendant as authorized by the Comptroller of the Currency" (R. 6-8).

On April 24, 1964, the parties entered into a stipulation of facts and other matters which contained no fact showing that Walker Bank has been or would be damaged by The First National Bank's branch. The parties did agree as follows:

> "At the time of the commencement of this action Plaintiff had demand and time deposits at its Cache Valley Branch in Logan, amounting to in excess of $10,000,000; it had outstanding loans in excess of $5,000,000 which has been made at said Cache Valley Branch; and it had an investment in furniture and fixtures and leasehold improvements at the Cache Valley Branch in excess of $50,000" (R. 12-13).

The parties also agreed that "each of the parties hereto reserves the right to offer evidence at the trial of this case

with respect to any issue of fact under the pleadings in this case which has not been resolved by the stipulation of facts hereinabove set forth, provided that:

> "The party intending to offer such evidence shall give written notice thereof to the other parties within thirty days from the date hereof . . " (R. 14).

Walker Bank gave no notice that it intended to offer any additional evidence at any time prior to trial and offered no evidence at trial. The First National Bank gave notice that it intended to offer evidence and thereafter the parties stipulated as to such evidence (R. 16-33).

In the second stipulation dated June 18, 1964, the parties stipulated that if Ronald S. Hanson were called to testify he would show that The First National Bank was agent for the Federal Reserve Bank to act for it in the event of emergency, and the branch bank would contain a large safe to permit The First National Bank to have the additional vault space necessary to act as such agent thus relieving the Walker Bank of the necessity of storing additional cash and currency in the event of a national emergency (R. 18).

On June 30, 1964, the parties stipulated that:

> "The case is hereby submitted to the court for its decision on the merits upon the facts stipulated to by the parties and set forth in the Stipulation of Facts and Other Matters, dated April 24, 1964, and filed herein and the Stipulation between plaintiff and the defendant, The First National Bank of Logan, dated June 18, 1964, and filed herein . . " (R. 35).

At the hearing before the trial court on September 15, 1964, the defendant First National Bank moved to dismiss on the grounds of lack of jurisdiction which motion was denied without opinion by the trial court (R. 36). In its Memo-

randum Decision of September 30, 1964, and in its Judgment of October 9, 1964, the trial court made no finding of facts relating to jurisdiction and made no conclusions that it has jurisdiction (R. 37-46). The trial court found that the Comptroller acted within his authority in issuing a certificate to The First National Bank authorizing a branch in Logan, Utah, and dismissed plaintiff's complaint. Walker Bank appealed the decision. The First National Bank did not cross-appeal but in its brief asked the United States Court of Appeals for the Tenth Circuit to sustain the dismissal of the complaint on the grounds that the District Court lacked jurisdiction because the amount in controversy alleged by the plaintiff had not been proved.

On October 26, 1964, the United States Court of Appeals for the Tenth Circuit entered its decision reversing the trial court and remanding the case to the District Court for a decision on The First National Bank's affirmative defenses relating to standing to sue, laches, and constitutionality of the Utah Statute. The decision of the Court of Appeals was silent as to whether the District Court was correct in denying the motion to dismiss on the grounds of lack of jurisdiction and there is nothing in the decision which specifically finds that the District Court had jurisdiction or whether the facts as stipulated by the parties show an amount in controversy in excess of $10,000.

The First National Bank's petition for rehearing on the grounds the District Court lacked jurisdiction was denied by the Court of Appeals without opinion on December 3, 1965 (R. 57-58).

SUMMARY OF ARGUMENT

Point I: The decision of the District Court dismissing Plaintiff's complaint can be affirmed and the opinion of the

Court of Appeals (Tenth Circuit) reversed on the grounds that the District Court lacked jurisdiction to hear plaintiff's complaint. Plaintiff claimed jurisdiction under 28 U. S. C. Section 1331, as the matter arises under the laws of United States and also claimed the jurisdictional amount of $10,000 was present. The amount in controversy allegation was denied by the defendants. Plaintiff presented no evidence showing it had been nor that it would be damaged by the operation of defendant's branch, but defendant presented evidence that plaintiff, in fact, was benefited by defendant's branch. The United States Supreme Court has held in KVOS v. Associated Press (1936) 299 U. S. 269, 57 S. Ct. 197, 81 L. ed. 183, and in McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135, that the plaintiff has the burden of showing damage to the plaintiff in excess of the statutory amount where the defendant denies the allegations of jurisdictional amount in his answer. The proof of the value or amount of plaintiff's business is not sufficient to show the amount in controversy. If the United States Supreme Court has held that plaintiff's failure to show damage requires dismissal of the complaint, *a fortiori* where the plaintiff shows no damage and the defendant shows a benefit to the plaintiff, the District Court lacks jurisdiction to hear plaintiff's complaint.

Point II: The District Court was correct and the Court of Appeals (Tenth Circuit) should be reversed as the Comptroller has authority to permit a national bank to branch in its own city where state law authorizes state banks to branch in that city. A national bank is a Federal agency and is subject to state restrictions only to the extent Congress has specified. The plain language of 12 U. S. C. Section 36 (c) (1) contains no restriction on National banks seeking to branch in their own cities other than express authority to branch in that city must be allowed by state law and the Comptroller must approve the

proposed branch. Utah law expressly authorizes state banks to branch in Logan under the provisions of the second paragraph of Section 7-3-6, Utah Code Annotated, 1953, and the Comptroller has authorized The First National Bank's branch so it is a lawful branch. The fact that plaintiff Walker Bank has established a branch in Logan also shows that state law expressly authorizes branch banks in Logan. In subdivision (2) of 12 U. S. C. Section 36 (c) which relates to national banks seeking to branch outside the city where they are located, Congress provided they must comply with location and capital restrictions of state law. The failure of Congress to include such restrictions in subdivision (1) indicates no restrictions were intended other than the written provision that state law must authorize branch banking in that city. This reasoning finds support in language used elsewhere on other banking matters by Congress which specifically imposes "identical" restrictions on national banks as state law imposes on state banks. But in authorizing establishment of branches within the city where the main bank is located Congress expressly provides for different capital requirements than those imposed by state law indicating that identical requirements are not intended. If Congress had intended the requirements of Federal law and state law to be identical, Congress would have used specific language so providing.

Point III: The legislative history of 12 U. S. C. Section 36 (c) (1) shows it was enacted to allow national banks to compete with state banks allowed to branch in the city where they were located and not to prevent them from competing as would be in the case if the decision of the Court of Appeals (Tenth Circuit) were upheld. In 1922 the Comptroller of the Currency authorized national banks to open teller windows in their own community. But in 1924 the United States Supreme Court said this was not authorized. The Comptroller went to Congress because he feared national banks would convert to

state banks if they could not open teller windows to serve their customers in their own community. In the McFadden Act of 1927 [the statute now appears in 12 U. S. C. Section 36 (c) (1)] Congress authorized national banks to branch within their own communities if state banks were permitted to branch. This law was enacted to permit national banks to branch if state banks are allowed to branch, but under the decision of the Court of Appeals (Tenth Circuit), a state can impose restrictions on a national bank with which it cannot comply (and thus prevent it from branching), but which restrictions are possible for every other bank in the state to meet, thus defeating the purpose of the Act of Congress. The Court of Appeals (Tenth Circuit) quotes language showing that the purpose of the McFadden Act was to put national banks more nearly on a par with state banks, but the decision of the Court of Appeals ignores this language in stating that national banks are subject to all restrictions of state law in establishing a branch. Imposing the requirements of state law in addition to the requirements of the authorized agent of Congress, the Comptroller of the Currency, places national banks under a double burden of procedural requirements and gives a substantial competitive advantage to state banks contrary to the cited purposes of the Federal branch banking law. The actions of Congress in writing 12 U. S. C. Section 36 (c) in rejecting the Bratton amendment as written, which imposed identical restrictions on outside and inside branches, and in not adopting the Vandenburg amendment, restricting branching to merger situations, and in writing two subdivisions (one for inside community branches containing no specific restrictions of state law and one for outside branches containing specific restrictions of state law), strongly indicates that Congress intended no additional restrictions on the authority to establish branches within the city where the main bank is located. The decision of the Court of Appeals (Tenth Circuit) makes subdivision (1) pertaining to inside branches inoperative or superfluous

even though there is a strong presumption against such an interpretation.

Point IV: This is a case of first impression. The decisions of lower courts holding that national banks seeking to branch outside the community where they are located are subject to the same location restrictions as state banks should not be cited as precedents here. Location restrictions are specifically included under subdivision (2) of 12 U. S. C. Section 36 (c) because Congress so provided. Congress did not include any location or any other restriction of state law in subdivision (1) of the statute and since state banks are expressly authorized to branch in Logan Utah, the Comptroller can authorize the only national bank located in Logan, Utah, to branch there.

ARGUMENT

Point I.

THE DISTRICT COURT LACKED JURISDICTION BECAUSE THE PLAINTIFF DID NOT PROVE THAT IT WOULD SUSTAIN ANY DAMAGE BY REASON OF THE OPERATION OF DEFENDANT BANK'S BRANCH AND THE DEFENDANT BANK SHOWED THAT THE PLAINTIFF IN FACT MAY BE BENEFITTED BY THE DEFENDANT BANK'S BRANCH.

The plaintiff is required to include in its complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." (See Rule 8 (a) Rules of Civil Procedure Title 28, U. S. C.) The plaintiff purported to comply with this requirement by stating that the action involved a Federal Statute, the plaintiff would suffer irreparable damage if the relief was not granted, and that the amount in controversy exceeded $10,000. The apparent intent of these allegations was to show that the District Court had jurisdiction under 28 U. S. C. Section 1331.

A. Objection to Jurisdiction is Available at any time in the Trial Court and the Appellate Court and cannot be Waived.

Both defendants denied that the plaintiff would suffer irreparable damage if the relief was not granted and denied that the amount in controversy exceeded $10,000. The defendant First National Bank specifically denied that the plaintiff would be damaged at all by the operation of defendant's branch (R. 6-9). No motion to dismiss was made prior to the hearing on the merits since the defendants were willing that plaintiff have every opportunity to show that it had been damaged or would be damaged by defendant's branch. (It should be understood that had any evidence of damage been offered the defendant bank was prepared to show that plaintiff is the second largest bank in the state of Utah, with 13 branches and resources in excess of $240,000,000 and is a member of a multi-state banking chain with deposits in excess of $6,000,000,000 and having some 447 banking offices throughout eleven western states and that the plaintiff was reporting a continuing favorable profit picture, so there would be no proof of damage to plaintiff by the operation of The First National Bank's branch in Logan. The First National Bank is a small unit bank with assets of $12,000,000 and only two places of business, its main office and its drive-in branch in Logan, Utah.)

At the time set for hearing on September 15, 1965, the parties had stipulated that all the evidence was before the Court (R. 35). Since the plaintiff had made no motion that it wished to re-open and offer additional evidence the defendant bank moved that the complaint be dismissed as Walker Bank had not shown that it had been nor would be damaged by defendant's branch and the only evidence pertaining to the issue of plaintiff's damages was that the plaintiff would be

benefited by defendant's branch. In denying defendants motion to dismiss for lack of jurisdiction the District Court found no fact showing damage. Since the defendants obtained dismissal of the complaint in the lower court on other grounds there appeared to be no necessity for a cross-appeal, and the defendant bank followed what seemed to be the law with regard to raising questions of jurisdiction and in its brief suggested to the United States Court of Appeals that there was no jurisdiction in this case. (See Rule 12 (h) (2), Rules of Civil Procedure, Title 28, United States Code.)

As stated in 54 Am. Jur. United States Courts, Section 137, p. 768, the objection to jurisdiction of Federal Courts can be raised at any time:

> "The objection is available at any time both in the trial court and in the appellate court, and cannot be waived. The statute does not however, prescribe any particular mode in which the question of jurisdiction is to be brought to the attention of the court, or how, when raised, it is to be determined. It may be raised by answer or by motion, or in any other manner sufficient to direct the attention of the court to the want of jurisdiction."

An objection to jurisdiction has even been raised in a petition for rehearing. [See Provenzano v. Porter, (9th Cir. 1946) 159 F. 2d 47, cert, den. 67 S. Ct. 1303)]

See also the annotation in 30 A. L. R. 2d at pages 614-615 in which the policy of strict construction of the statutes giving Federal Courts jurisdiction is discussed and cases are cited which support the rule that the questions of jurisdiction can be raised at any time.

B. The Burden is on the Plaintiff to Plead Facts which show Jurisdiction and to Prove such Facts when Challenged by the Defendant's Pleadings.

The overwhelming majority of courts have stated that the plaintiff in order to obtain jurisdiction of a Federal Court for the purpose of having an injunction issue must show that the plaintiff has a right which will be damaged in excess of $10,000 if the defendant continues its present practices. (See Annotation in 30 A. L. R. 2d p. 602). Two cases decided by the United States Supreme Court are similar to the fact situation here.

The first case of KVOS v. Associated Press (1936) 299 U. S. 269, 57 S. Ct. 197, 81 L. ed. 183, involved an action by the Associated Press against a radio station to enjoin it from pirating news broadcast items gathered by the Associated Press and distributed to its members. The complaint alleged:

> " . . the damage to which complainant is being subjected . . is in excess of the sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum . .
>
> " . and the continuance by (KVOS) of its practice will increasingly cause irreparable injury and damage to the (Associated Press) because the effort and expenditures to gather and obtain news will be rendered largely without reward or value so far as concerns the territory served by petitioner's station."

It will be noted that the allegations of Associated Press go further than the allegations of Walker Bank and give a reason for the irreparable damage while Walker Bank merely alleged the jurisdictional amount and irreparable injury.

KVOS filed a motion to dismiss on the grounds that "complainant has not lost any amount and never will lose any amount by reason of this controversy" which is virtually identical to The First National Bank's defense that the Walker Bank

has not been and will not be damaged by its branch. But The First National Bank went further and alleged that its branch may even be a benefit to Walker Bank.

In the KVOS case the Supreme Court said the District Court found as follows:

> " . .the amount in controversy herein, by reason of the defendant's (KVOS) motion to dismiss, must be construed to be in excess of $3000.00 exclusive of interest and costs (and) found the facts as to the business and conduct of the parties substantially as alleged in the complaint."

As conclusions of law the Supreme Court said the District Court found as follows:

> " . . that (the court) had jurisdiction of the parties and the subject matter . . (that) the acts of (KVOS) did not amount to unfair competition . . and did not violate their property rights."

The District Court in the KVOS case dismissed the complaint on its merits.

The Utah District Court also denied the defendants' motion to dismiss on the grounds of lack of jurisdiction and since it did not make any findings that Walker Bank had been or would be damaged by defendant's branch, the court must have construed the defendants' motion to dismiss as requiring it to conclude that the amount in controversy must be over the jurisdictional amount as did the District Court in the KVOS case. The District Court also found on the merits as did the District Court in the KVOS case that no injunction should issue but that plaintiff's complaint should be dismissed.

In the KVOS case the Circuit Court of Appeals reversed the District Court on the merits, but found jurisdiction from

the following facts quoted by the United States Supreme Court in its opinion:

> "The several millions of dollars here alleged to be invested in the Association's business may well be damaged to the extent of $3,000 by the pirating practices described."

The premise that a Federal Court could assume that a plaintiff would suffer damages because of its large investment where it alleged illegal action by a competitor was rejected by the United States Supreme Court when it said:

> " . .we hold that in the circumstances the respondent (plaintiff, Associated Press) had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it . .
>
> " . . The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars . .
>
> " . But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof.
>
> " . . Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such

withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill.

"The Circuit Court of Appeals sustained the District Court's jurisdiction on the ground that the findings upon that point (jurisdiction) was not without support, and the appellate tribunal could not say it was wrong, in view of the magnitude of the respondent's operations and expenditures. . these factors are irrevalent upon the issue of the value of the right for which protection is here sought."

Here Walker Bank had the burden of showing the case was within the District Court's jurisdiction and failed to sustain that burden. Even though it is not alleged (which makes this case even weaker than the argument used by Associated Press in the KVOS case) we assume that the right for which Walker Bank's suit seeks protection is that it should be free to conduct its branch operations in Logan without interference by The First National Bank's branch. But as in the KVOS case no facts are pleaded or proved which show the value of that right. The general allegations of damage and injury were challenged by The First National Bank in its answer. The United States Supreme Court said that in such case the plaintiff must support them by competent proof. Even though Walker Bank did not allege it would lose customers and business if The First National Bank's branch continued operations, if we assume that it intended such allegation to be included in its "irreparable injury" allegation, the United States Supreme Court said this is insufficient because "no intimation is given of the character or extent of the damage they would suffer by such withdrawal" or loss of customers. Walker Bank said it had a large investment and does a large business in Logan, but the United States Supreme Court held that these matters are "irrevalent upon the issue of the value of the right for which protection is here sought."

In such case the Supreme Court held in the KVOS case:

> "Since the allegation as to the amount in controversy was challenged in an appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed."

See also Skelley Oil Company v. Phillips Petroleum Co. (1950) 339 U. S. 667, 70 S. Ct. 876, 94 L. ed. 1194 and Davis v. American Foundry Equipment Company, 94 F. 2d 441, 115 A. L. R. 1486 (7th Cir.) holding that the Declaratory Judgments act did not change the jurisdictional requirements for suits in Federal Courts.

The second case of McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 80 L. ed. 1135, 56 S. Ct. 780, involved an action by General Motors to enjoin the enforcement of a statute dealing with installment sales. The District Court granted an injunction and the case went to the United States Supreme Court on direct appeal. The Court said:

> "The question arises whether the matter in controversy exceeds the sum or value of $3,000 . . so as to give the District Court jurisdiction . . The complaint alleged that the requisite amount was involved and this allegation was denied by the answer."

The identical situation is involved here where Walker Bank's allegation was denied by the defendants. The Court went on to say:

> "Respondent points to the allegations of its bill that the net worth of its business exceeds $50,000; that in 1934 it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000 . . "

Here it was stipulated that Walker Bank has an investment in Logan in excess of $50,000 in buildings and fixtures and that it has outstanding loans of $5,000,000. The facts as to jurisdiction are almost identical. The Supreme Court said:

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference . . But in the instant cast the statute does not attempt to prevent respondent from conducting its business."

The authorization to the First National Bank to operate a branch does not attempt to prevent Walker Bank from conducting its business through its branch in Logan, Utah. The Court concludes:

"The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulations. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegations as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Here the value of Walker Bank's business is not involved save to the extent that it may be affected by the operation of defendant bank's branch. The value of that right may be measured by the loss, if any, that follows from defendant's branch operation. The allegations of Walker Bank's complaint throw no light upon that subject. There were no facts alleged showing what, if any, curtailment of business and consequent loss the operation of the branch would involve. The complaint is thus destitute of any appropriate allegation as to jurisdictional amount, save the general allegation as to jurisdictional amount.

That allegation was put in issue by defendant's answer and the record discloses neither finding nor evidence to sustain it.

In holding that the plaintiff has the responsibility of pleading and proving the facts necessary to give the District Court jurisdiction the Supreme Court said:

> "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the Court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by the mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not challenged the court may still insist that jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."

Walker Bank having failed to prove any present or future damage by reason of the operation of defendant's branch and the allegations of the complaint as to jurisdictional amount

having been denied by the defendants, the conclusion of this case should be as stated by the Supreme Court:

> "Here the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegations of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed on that ground."

C. The Plaintiff Failed to Prove Facts Showing that the District Court had Jurisdiction.

The defendant has stated in both the District Court and in the Court of Appeals (Tenth Circuit) that Walker Bank has not been and will not be damaged by the operation of the defendant's branch in Logan. This statement has never been challenged by Walker Bank. Defendant bank does not believe in view of the foregoing authorities that it had the burden of showing that no damage has been or will be suffered by Walker Bank. However, the defendant in order to avoid a ruling that the law requires such showing presented evidence that defendant's branch benefits Walker Bank. The stipulated facts do not show that The First National Bank's drive-in branch will cause any damage to plaintiff Walker Bank. The stipulated facts do show that The First National Bank's branch may be a benefit to Walker Bank in the event of a National Emergency and that it is a present benefit to Walker Bank because it relieves Walker Bank from the necessity of storing additional currency in the event of a National Emergency.

As has been stated Walker Bank is an affiliate of one of the largest chain banking systems in the Western United States with assets in excess of $6,000,000,000. The Logan branch of Walker Bank, located in the center of the city's business district at 102 North Main Street, has established a drive-in

teller's window at 35 East 1st North, separated from its main banking office by a right of way.* The First Security Bank of Utah, Logan branch, has a similar window.

Physical circumstances makes it impossible for The First National Bank to provide a drive-in window for its patrons separated only by a right of way. [In fact such a window may be a branch under the definition in the Federal statute. See Jackson v. First National Bank of Valdosta (D. C. Georgia) 246 Fed. Supp. 134.] Since an additional office for receiving deposits or paying checks or making loans is a branch under Federal law [see 12 U. S. C. Section 36 (f)], The First National Bank sought and obtained approval to establish a branch bank consisting of a drive-in window for such purposes three blocks away from its main office for the convenience of its customers. Such drive-in service for its own customers, established in order to compete with the drive-in service of the two largest banking chains in Utah, obviously is not causing either bank any damage. (All the banks, branches and additional drive-in offices in Logan are located within a five block portion of the eight block Main Street business section.) The mere allegation that a small town bank's drive-in window could possibly injure the giant banking chain of which Walker Bank is a part is almost too absurd for further discussion.

The fact remains, however, that the plaintiff, Walker Bank, presented no evidence to the District Court that it was dam-

*After this action was commenced The First National Bank challenged the establishment of the drive-in window on the grounds that it was a branch in the state courts. The District Court for Cache County, Utah, held that since it was connected by a pneumatic tube it was not a branch. The case is presently pending in the Utah Supreme Court, No. 10621. Even if the Supreme Court should reverse the lower court, Walker Bank still has sufficient space surrounding their branch bank in Logan to remodel and establish a drive-in window as a part of their main branch banking office.

aged. The First National Bank presented evidence of a benefit. The complaint of Walker Bank was therefore properly dismissed and the decision of the District Court can be sustained on grounds of lack of jurisdiction.

If the Court does not agree with the defendant bank's position, it is respectfully requested that the Court indicate the basis on which the Court finds that Walker Bank has been or will be damaged by defendant's branch so that the defendant can present facts which controvert such conclusion in the District Court.

If the Court agrees with defendant's position, it is respectfully requested that the Court affirm the decision of the District Court to dismiss the plaintiff's complaint and reverse the decision of the Court of Appeals (Tenth Circuit) on the grounds that the basis for the District Court's jurisdiction has not been established by the plaintiff.

Point II.

THE PLAIN LANGUAGE OF 12 U. S. C. SEC. 36 (c) (1) AUTHORIZES THE COMPTROLLER OF THE CURRENCY TO PERMIT THE FIRST NATIONAL BANK TO ESTABLISH A BRANCH IN LOGAN, UTAH.

A. Actions of the Comptroller of the Currency are Subject to State Restrictions only to the Extent Congress has Stipulated.

The issue in this case is not precisely the same as that presented in First Security Bank of Utah, N. A. v. Commercial Security Bank, No. 1009 and Saxon v. Commercial Security Bank, No. 1126, consolidated herewith, as in these cases it is possible for The First Security Bank of Utah to comply with the requirements of Utah State law. The precise issue here is whether Congress intended that the State of Utah could

impose conditions upon branch banking which permit branching in Logan by state banks, but which conditions are impossible for the national bank to meet if it desires to branch within its own city of Logan.

The Court of Appeals (Tenth Circuit) said that because the Utah State Supreme Court held in Walker Bank v. Taylor, 15 U. 2d 234, 390 P. 2d 592 (1964), that under Section 7-3-6, Utah Code Annotated, 1953, the State Bank Commissioner could not authorize a state bank to establish a branch within the limits of the city of Provo, Utah, where it is located because of its own location as a unit bank in that city and the absence of other unit banks (as distinguished from branches) which it could take over, the Comptroller is also prohibited from authorizing a national bank to branch in a similar situation under 12 U. S. C. Sec. 36 (c) in Logan, Utah.

However, the actions of the Comptroller of the Currency are subject to state restrictions only when, and only to the extent that Congress has stipulated. Mercantile National Bank v. C. H. Langdeau, (1963) 371 U. S. 555, 83 S. Ct. 520, 9 L. ed. 2d 523; Van Reed v. Peoples' Nat. Bank of Lebanon, (1905) 198 U. S. 554, 557, 25 S. Ct. 775, 49 L. ed. 1161; and Davis v. Elmira Savings Bank (1896) 161 U. S. 275, 16 S. Ct. 502, 40 L. ed. 700. National Banks are organized as a discrete system and as such are immune from state control except insofar as Congress permits. Farmers & Mechanics National Bank v. Dearing, 91 U. S. 29, 23 L ed. 196; McCullough v. State of Maryland, 4 Wheat 316, 17 U. S. 316, 4 L. ed. 579. Plainly no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. First National Bank of California, 262 U. S. 366, 43 S. Ct. 602, 67 L. ed 1030. See also Franklin National Bank v. New York (1954) 347 U. S. 373, 74 S. Ct. 550, 98 L. ed. 767 and the annotation in 98 L. ed. at pages 775-784.

B. The First National Bank has Complied with the Requirements of the Federal Statute.

The applicable section of the Federal statute in question here reads in part as follows:

> "12 U. S. C. Section 36 (c): A national banking association may with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;"

Therefore, the requisites for the establishment of a branch bank by a national bank where both are located within the limits of the city where the main office of the parent bank is located as follows:

1. Approval of the Comptroller of the Currency. This was obtained by The First National Bank on January 17, 1963, and Certificate of Authority No. 6983A was issued on January 21, 1963 (R. 13).

2. Establishment and operation of branch banks must be expressly authorized to state banks by the law of the state. The second paragraph of Section 7-3-6, Utah Code Annotated, 1953, expressly authorizes state banks in Utah to establish branch banks:

> "With the consent of the bank commissioner any bank having a paid in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus)" (R. 41).

Paragraph 5 of the Stipulation of Facts and Other Matters (R. 12) and paragraphs 2 and 4 of plaintiff's complaint (R. 3)

admit that state banks are expressly authorized to establish branches in Logan, Utah, as Walker Bank has established a branch in Logan under the state statute.

Since both requirements of 12 U. S. C. Section 36 (c) (1) have been met in the establishment and approval of a branch bank in Logan, Utah, by The First National Bank of Logan, plaintiff's complaint was correctly dismissed by the District Court. Imposing any other requirement on The First National Bank of Logan, or reading the statute in any other manner is contrary to the generally accepted rule as stated in 50 Am. Jur. Statutes, section 227:

> "The only mode in which the will of a legislature is spoken, is in the statute itself . . The Courts may not speculate as to the probable intent of the legislature apart from the words."

It is respectfully submitted that the Court of Appeals (Tenth Circuit) disregarded this rule in finding that Congress intended that the Comptroller of the Currency should "look at all the State law on branch banking and not just a part of it" (R. 56), and that he must find that "the branch is authorized in all respects by the law of the State in which the bank is located" (R. 51) before he can issue his certificate of approval. In other words that in enacting subdivision (1) Congress intended that national banks are subject to the identical restrictions as state banks in seeking authority to branch within the limits of the city, town, or village where they are located.

But the words of the Federal statute do not provide that a national bank must comply with all the requirements of state law before it can establish branches within the limits of the city where it is located. Imposing such conditions on national banks requires them to comply with additional restrictions of state law as well as the provisions required by Federal law and

the Comptroller's rules which are not imposed on state banks and consequently gives state banks a "substantial competitive advantage" (R. 56).

For example, if all the requirements of state law are imposed on national banks, the national bank must also get approval of the State bank commissioner before it can branch. (See sixth paragraph of Section 7-3-6, Utah Code Annotated, 1953). National banks would therefore be required to comply with regulations of two administrative bodies instead of the one required by state banks.

If Congress intended identical requirements to govern both state and national banks, why did Congress provide in 12 U. S. C. Section 36 (d) and 12 U. S. C. Section 51, that a national bank must have a paid in capital and surplus of $240,000 before it can branch within the city where it is located, even though a state bank can branch with a paid in capital and surplus of one-fourth this amount under the second paragraph of Section 7-3-6, Utah Code Annotated, 1953.

If Congress intended that identical requirements of State law are applicable to national banks establishing branches within the limits of the city, town, or village where they are located, why did Congress provide in 12 U. S. C. Section 36 (c) (2) that the minimum requirements of capital imposed by state law on banks establishing branches outside the community where they are located are imposed on national banks, without imposing any such requirement on national banks establishing branches inside the city limits where the main office is located. In the original Banking Act of 1933 outside branches, but not inside branches, were limited by certain capital stock requirements, based on pupulation (48 Stat. 190). In 1952 this was changed to make capital stock and surplus requirements for outside branches the same as the less stringent

state law requirements for establishing outside branches by state banks (Act of July 15, 1952, 66 Stat. 633 H. Rept. No. 2423, 82nd Cong., 2nd Sess.) But such identical restrictions of state law were not imposed on national banks seeking to establish branches inside the community where they were located.

In view of the opposition in Congress to branching outside the community (see 67 Cong. Rec. 3248) it seems somewhat incongruous to hold that national banks branching inside their communities are subject to more restrictions than national banks branching outside their communities. In First National Bank of Smithfield, North Carolina, v. Saxon (4th Cir. 1965) 352 F. 2d 267, at 271, the protesting bank contended that the approval of the Comptroller for establishing branches outside the city limits where the main bank was located was "contingent upon his compliance with the inquiries and ascertainments required of the State Commissioner of Banks by the North Carolina statute." But the court said that "We disagree with the argument." In that case the protesting bank was relying upon specific statutory language restricting the Comptroller's authority. There is no restrictive language upon which the protesting bank can rely in subdivision (1) of 12 U. S. C. Section 36 (c). See also the well reasoned opinion of Judge Fox in American Bank & Trust Co. v. Saxon (1965) 248 F. Supp. 324*

The only restrictions imposed by Congress on national banks branching outside their communities are (1) approval

*In this case the court held that once a state had committed itself to the public policy of allowing branch banking, state limitations could not be applied to the Comptroller and his approval alone was required for the establishment and operation of branch banks of the national banking institutions in Michigan. The Court declined to follow the reasoning of the Court of Appeals (Tenth Circuit) saying:

"Had Congress intended precise parity between the two sys-

of the Comptroller of the Currency, (2) statutory authority for branching must be in state law, (3) subject to location requirements of state law, and (4) subject to capital restrictions of state law. But national banks branching within the community where they are located under the decision of the Court of Appeals (Tenth Circuit), must not only show (1) approval of the Comptroller of the Currency and (2) express authority for branching in state law, as provided in 12 U. S. C. Section 36 (c) (1), but they must also show compliance with all provisions of state law, including:

(a) Compliance with capital and surplus requirements of 12 U. S. C. Section 51 or such greater requirements as may be imposed by state law (even though Congress did not write language in the statute so providing).

(b) Compliance with state procedures or methods of branching such as taking over an existing unit bank (even though Congress did not write language in the statute so providing).

(c) Compliance with findings of State Bank Commissioner as to public convenience and necessity (even though Congress did not write language in the statute so providing), even though such findings differ from those of the Comptroller of the Currency.

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tems it could have provided by plain language to that effect. Such language is conspicuously absent in the statute."

The court also noted that the act was passed during the depression at the height of the banking crisis (three days after President Roosevelt had declared a National Bank Holiday) and said:

"To now urge that a statute should be construed in favor of the interests which opposed its passage, even at a time when the aim of the President was to conserve the system within which banks operated, and to strengthen them against future crises, is to blindly ignore the history of both our country and this legislation."

(d) Approval of the State Bank Commissioner (even though Congress did not write language in the statute so providing).

(e) Showing public convenience and advantage at a public hearing conducted by the State Bank Commissioner (even though Congress did not write language in the statute so providing).

(f) Where there is no other unit bank which can be taken over in the city where the bank is located, forming an independent unit bank for five years and then taking over the same (even though Congress did not write language in the statute so providing.)

(g) In states such as Indiana containing even more detailed statutory requirements than Utah, the national bank must also show that it has complied with the State Bank Commissioner's restrictions on unavailability of parking facilities (even though Congress did not write language in the statute so providing). (See Acts of 1963, Chap. 350, amending Anno. Stat. (Burns) 18-1707.)

The above list could be multiplied by reference to the details of each state statute. We submit that the foregoing is sufficient to show that the words of 12 U. S. C. Section 36 (c) (1) do not incorporate all the requirements of state law with respect to branching by national banks.

C. The Restrictions in Subdivision (2) of 12 U. S. C. Section 36 (c) are not Incorporated in Subdivision (1).

In the lower court the plaintiff did not contend that all restrictions of state law are incorporated into 12 U. S. C. Section 36 (c) (1), but claimed that the words contained in Subdivision (2) of 12 U. S. C. Section 36 (c) which provide that national banks seeking to establish branches outside the limits of the city where they are located are "subject to the

restrictions as to location imposed by the law of the State on State banks" should also be made applicable to subdivision (1) of the statute pertaining to the establishment of intracity branches (R. 3-4).

The plaintiff then argued for a broadened meaning of the geographical restriction as to location imposed by subdivision (2) to include the limitation as to method or procedure or the economic limitation imposed on state banks in the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953. Plaintiff argued that the location restriction and the broadened interpretation thereof also applied to subdivision (1) of 12 U. S. C. Section 36 (c). (See the last sentence of paragraph 5 of plaintiff's complaint (R. 3-4).

The cases used by plaintiff to support its position refer only to banks seeking to branch outside their communities under 12 U.S.C. Section 36 (c) (2) and hold only that if an outside state bank may at the time establish a branch in the city, town or village where the national bank desires to branch, the national bank may also establish and operate a branch, and if any outside state bank may not at the time establish a branch in that city, town or village, the national bank is similarly restricted because of the location restriction in subdivision (2). In any event, to impose any additional requirement under the provisions of 12 U. S. C. Sec. 36 (c) (1) by attempting to read into such provision a broadened interpretation of the location restrictions on establishment of branches outside the city limits where the bank's main office is located as contained in 12 U. S. C. Sec. 36 (c) (2) is contrary to the plain meaning of the words used by Congress, is contrary to the general rule of determining the intent of the legislature above cited, and it also violates the ordinary rules of grammar and of English punctuation with regard to the use of the semicolon. As stated in Webster's New Collegiate Dictionary, 1958 Edition, page 1150:

"A semicolon is used to separate the clauses of a compound sentence: (1) In the absence of any connective. (2) When an antithesis exists between the clauses. (3) When there is a marked change in thought. (4) Where the connective is one of the conjunctive adverbs. (5) When the clauses themselves contain commas."

It is submitted that the only proper interpretation of why Congress used a semicolon at the end of subdivision (1) of 12 U. S. C. Sec. 36 (c) is under (2) above which provides that a semicolon is used "when an antithesis exists between the clauses." There is a connective "and" following the semicolon so it was not used because there was no connective. The entire paragraph is discussing establishment of branch banks so there is no marked change in thought. A conjunctive adverb is not used. And Congress is not using a semicolon because the clauses contain commas because Congress does not use a semicolon prior to the last "and" in the first sentence of 12 U. S. C. Section 36 (c), even though the clauses contain commas, in order that the reader of the statute may clearly understand that the purpose of the only semicolon in the entire first sentence is to show that an antithesis exists between the two main clauses of the compound sentence. In other words, Congress in writing 12 U. S. C. Sec. 36 (c) defined the conditions for establishing branches under two separate circumstances: (1) Within the limits of the city, town or village in which said (national banking) association is situated; and (2) at any point within the state in which said (national banking) association is situated – other than within the limits of the city, town or village in which said association is situated as aforesaid. Any restriction contained in the wording of subdivision (2) of said section 36 (c) (e. g. subject to the restrictions as to location imposed by the law of the state on state banks) refer only to subdivision (2) of the section.

The use of the semicolon by Congress also indicates an intent to follow the general rule of grammatical construction.

In Hopkins v. Hopkins, 287 Mass. 542, 192 N. E. 145, 147, 95 A. L. R. 1286, the Court said:

> "It is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation."

In Kales v. City of Oak Park, 315 Mich. 266, 23 N. W. 2d 658 (1946) the court said in citing the Hopkins v. Hopkins case, supra.:

> "The last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence."

There is nothing in the language of the statute to indicate that Congress intended that the two modifying clauses in 12 U. S. C. Sec. 36 (c) (2) (i. e. "if such establishment . are . . authorized affirmatively . , and subject to the restrictions as to location imposed by the law of the state on state banks") have reference to anything but the clause in subdivision (2) which reads "at any point within the state in which said association is situated."

A reading of 12 U. S. C. Sec. 36 in its entirety lends weight to this interpretation. Whenever Congress intended that a specific method or procedural restriction of state law would apply it so stated. For example:

1. In subsection (b) (1) where a state bank is converted to a national bank "The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a state bank (*in a situation identical to that of a national bank*) resulting from the conversion of a national bank would be prohibited by the law of such state from retaining and operating as a branch *an identically situated office* which was a branch of the national bank immediately prior to conversion."

2. Also in subsection (b) (2) where a national bank is consolidated with another bank "The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a state bank (*in a situation identical to that of the resulting national bank*) resulting from consolidation into a state bank of another bank or banks would be prohibited by the law of such state from retaining and operating as a branch an *identically situated office* which was a branch of the state bank immediately prior to consolidation."

3. In subsection (c) a capital stock limit is imposed by the phrase that "no such association shall establish a branch outside of the city, town or village in which it is situated unless it has a combined capital stock and surplus *equal* to the combined amount of capital stock and surplus, if any, *required by the law of the state* in which such association is situated for the establishment of such branches by state banks." (Italics added.)

Congress has been specific when it desired to impose the methods or procedural restrictions of state laws on national banks. If Congress had intended that establishment of national bank branches, within the city limits where the bank's main office is located, should be under the identical restrictions as are imposed on state banks, Congress would have so stated as it did in other parts of the branch banking statute above referenced.*

*See also specific restrictions of state law imposed by Congress on other banking matters when it desired specific restrictions: Fiduciary powers, (76 Stat. 668, 1962) 12 U. S. C. 92a (a) & (b); interest (48 Stat. 191, 1933) 12 U. S. C. Section 85 and (44 Stat. 1224-25) 12 U. S. C. 371; and Merger (64 Stat. 456, 1950) 12 U. S. C. 214c. But in the important competitive area of capital requirements, Congress virtually ignored state law capital requirements for branches within the city, which strongly indicates that in establishing new banks or new branches within the city where the bank is located, Congress wanted Federal policy to govern and not state policy. (See 12 U. S. C. Sections 36 (d) and 51.)

Point III.

THE DECISION OF THE DISTRICT COURT IS IN ACCORD WITH THE LEGISLATIVE HISTORY OF 12 U. S. C. SECTION 36 (c) (1).

A. The McFadden Act did not Incorporate all provisions of State Law.

As previously indicated it is unnecessary to consider the legislative history of a statute with language as clear as 12 U. S. C. Section 36 (c) (1). However since the Court of Appeals (Tenth Circuit) used legislative language as a basis for imposing additional requirements on the provisions of subdivision (1) a review of national banking legislation seems appropriate.

Following the financial panic of 1907 a number of states, led by California, began to authorize branch banking. By 1927 branch banking was permitted, with minor modifications, in seventeen states. No authority was given to national banks to establish branches, but in 1922, the Comptroller of the Currency ruled that national banks could open additional "teller windows" in their home cities. This device was thwarted by the Supreme Court in First National Bank in St. Louis v. Missouri (1924) 263 U. S. 640, 44 S. Ct. 213, 68 L. ed. 486 which held that such offices were unlawful in states where branching was prohibited by state law. (If branch banking is prohibited by state law in Logan, Utah, defendant finds it difficult to understand, under the language of this case, why Walker Bank objects to The First National Bank's drive-in window located three blocks from the main office, and does not object to the Logan branch of the First Security Bank of Utah having a similiar drive-in window about one block from its main branch office; or why it is legal for a state bank, Walker Bank, to have a branch bank located at 102 North

Main Street in Logan, Utah, and an additional office located at 35 East 1st North, Logan, Utah, consisting of a drive-in teller window for receiving deposits and paying checks, but illegal for The First National Bank to have a similar office two and one-half blocks further away from its main office.)

The ruling caused the advocates of branch banking to initiate legislation in Congress to permit branch banking by national banks. The bill was opposed by those who feared giant banking monopolies, and Representative Cannon's statement is typical of their arguments:

> "The principle of branch banking when allowed to develop unhampered establishes a monopoly. It creates a gigantic banking octopus, with branches extending like tentacles from the larger cities out to the small towns, throttling local banks and sucking out of the country and into the city the deposits and resources which should be available for local enterprises . . .
>
> "There can be no comparison of the relative merits of the branch bank and the home-owned bank in their influence upon a community and its prosperity. The home bank, owned by local businessmen, has at heart the interest of the town and seeks to build up the community and contribute to its prosperity. The branch bank is owned by outsiders, who have no pride in local affairs and who seek only profits and dividends. The home bank pays its taxes at home and contributes to home institutions and enterprises and its stockholders spend their earnings at home. The branch bank pays the bulk of its taxes in other States and municipalities. It makes little or no contribution for local purposes, and its dividends are drawn from the town in which they are made and spent in distant cities. The home bank is controlled and managed by local boards of directors, the purest form of local self-government, while the branch banks are controlled by professional financiers, with little understanding and less sympathy for the needs and problems of their customers, and is, in short, a species

of carpetbag government. The home bank means home control, independent and cooperative. The branch bank typifies the overlordship of great money monopolies centered in alien territory, to which the patrons of every branch bank pay tribute as truly as the countrymen of the Nazarene paid tribute to Caesar in the golden age of the Roman Empire." (67 Cong. Rec. 3248.)

The proponents of branch banking followed the reasoning of the Comptroller of the Currency, H. M. Dawes, in his testimony before the House Banking and Currency Committee in seeking for approval of the bill:

"At the outset it should be stated that while the question of extending outside facilities in the form of offices or branches beyond the limits of the parent institution but confined to municipal limits is one that might be properly controversial, it does not, to my mind, involve the fundamental principal of branch banking. So long as such an operation is confined strictly to municipal limits, it remains in its essence a community operation conducted for the benefit of residents by residents.

"I will not discuss the necessity or develop the arguments which have induced State legislatures to permit this form of operation. It seems to me it is sufficient to say that these intracity activities do not run parallel at all to the operations which are involved in the extension of banking influence by direct control in the form of branches covering a whole State or limits beyond the municipality. If the principle of local control over banking facilities within city limits is recognized and such an operation is forbidden in one and permitted in another State, it would not be a real concession to any branch banking principle, since intracity banking is, after all, community banking as distinguished from state, district or national banking." (65 Cong. Rec. 11297.)

By such arguments the advocates of branch banking legislation were able to convince the opponents of branch banking

that authorization to national banks to branch within the limits of the city where the association is situated if the state law permits branching by state banks did not involve the branch banking monopoly problem with which they were concerned and the authorization was only to permit the national bank to meet competition from state banks. The compromise measure known as the McFadden Act was adopted (Act of February 25, 1927, c. 191 Sec. 4, 44 Stat. 1228). This measure contained virtually the same provisions as now appear in subdivision(1) of 12 U. S. C. Section 36 (c) except at that time a further provision limiting such branches to cities having a population in excess of 25,000 was included which has since been deleted (but which shows that Congress was not thinking about imposing identical restrictions of state laws, but was prescribing its own restrictions on branching regardless of state law so long as the state permitted branch banking). There is nothing in the legislative history of the McFadden Act that would indicate that Congress intended that any procedural restrictions of state branch banking laws were to be applicable to national banks desiring to branch within city limits where they were situated, since Congress considered intra-city branches as community banking and not branch banking. [The statute passed in order to permit national banks to compete with state banks, but Walker Bank, a giant state bank, argues and, if the decision of the Court of Appeals (Tenth Circuit) is affirmed, will use the statute to throttle the competition of the local First National Bank.]

The Court of Appeals (Tenth Circuit) uses three statements from legislative history of the McFadden Act to support its position that Congress intended all restrictions of State law to be included in the McFadden Act:

a. "Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have

been operating within recent years," [(H. Rept. No. 83, 69th Cong. 1st Sess. 1926 (R. 52).]

There is nothing in this statement that says national banks are subject to the identical restrictions as state banks, but this statement only implies that the new powers given to national banks have been derived from the experience of various states.

b. "This section recognizes the right of national banks to establish branches within those cities in which state banks have that privilege . . " (Ibid).

Do state banks have the privilege to branch in Logan, Utah? Walker Bank and The First Security Bank of Utah have branches in Logan (and can still branch in Logan at this time by taking over The First National Bank) so it cannot be denied that state banks have the privilege to branch in Logan, Utah.

c. "The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks." (Ibid.)

Does the decision of the District Court or that of the Court of Appeals put The First National Bank "more nearly on a par" with Walker Bank? Under the decision of the District Court the two banks have the following rights:

a. First National Bank:

(1) Right to continue to operate drive-in window branch to receive deposits and pay checks.

(2) Power to establish another branch if it raises an additional $100,000 in capital (12 U. S. C. Sections 36 (d) and 51), and obtains approval of Comptroller of Currency as to necessity, effect on existing competitive situation and availability of management and resources.

(3) No power to take over branch of Walker Bank or First Security Bank and eliminate some competition in Logan because of 12 U. S. C. Sec. 36 (b).

b. Walker Bank:

(1) Right to continue to operate its additional drive-in office at 35 E. 1st No. to receive deposits and pay checks.

(2) Power to establish another branch if its stockholders raise $32,000 in additional capital and establish a new bank which can be taken over as a branch in five years (Sections 7-3-10 and 7-3-6, Utah Code Annotated, 1953) and obtains approval of State Bank Commissioner as to necessity and public convenience.

(3) Power to take over The First National Bank of Logan and eliminate some competition in Logan, and after such take over it would, of course, have unlimited power to branch in Logan.

The higher capital requirements in order to establish a new branch, and the lack of any right to take over competitor branches still leaves The First National Bank of Logan at some competitive disadvantage with Walker Bank which is only partially off set by the five year advantage in not being required to establish a new independent bank which can later be acquired as a branch.

Under the decision of the Court of Appeals (Tenth Circuit) the two banks have the following rights:

a. First National Bank:

(1) No right to continue to operate a drive-in window for the convenience of its customers to receive

deposits and pay checks, even though the branches of competitor banks in Logan have that privilege.

(2) Power to establish a drive-in window only if:

(i) It raises $100,000 in additional capital and organizes an independent bank to be taken over in five years.

(ii) At the end of five years it obtains the approval of the State Bank Commissioner to take over the independent bank and operate as a branch.

(iii) It satisfies the State Bank Commissioner as to public convenience and necessity.

(iv) It also obtains the approval of the Comptroller of the Currency and satisfies the requirements of the National Bank Examiner as to necessity, effect on existing competition (which may be impossible to do because such take over cannot help but reduce competition and thus will be contrary to the policy of the Federal Government), and availability of management and resources (which obviously will be extremely difficult for a small unit bank to obtain because it is not large enough to train future managers for banks with an uncertain future.)

(3) No power to take over branch of Walker Bank or of First Security Bank and eliminate some competition in Logan because of 12 U. S. C. Sec. 36 (b).

b. Walker Bank has the same rights under the decision of either court.

It should be obvious that under the decision of the Court of Appeals (Tenth Circuit) the various requirements of state and national law are now so numerous as to make it almost

impossible for The First National Bank to acquire a drive-in office in order to compete with the branches of other banks in Logan. For while The First National Bank was trying to obtain approval of the Comptroller of the Currency to take over the independent bank its stockholders had nursed along for five years in the hope it would some day be a branch, a state bank could move in and make such an attractive offer the stockholders could not refuse and State Bank Commissioner approval to a state bank would come more readily than approval of both the State Bank Commissioner and the Comptroller of the Currency could be obtained by the national bank. Indeed, the anti-monopoly policy of the Congress and the Comptroller of the Currency may make it impossible to take over such bank because it would reduce competition in Logan. The state bank would not be restricted because the Utah statute expressly permits reduction of competition by mergers and take-over of existing unit banks.

So far as The First National Bank of Logan is concerned, the decision of the Court of Appeals (Tenth Circuit) so encumbers the provisions of the McFadden Act as to make them worthless.

B. The Glass Bill did not Change the Requirements of the McFadden Act respecting Branching Inside the City Where the Main Bank is Located.

The banking crisis of the early thirties prompted the introduction by the Banking and Currency Committee of the Senate of legislation commonly known as the Glass Bill. This bill proposed to amend the McFadden Act so as to authorize national banks to establish state wide branch banking without regard to whether state law permitted branch banking (75 Cong. Rec. 9711 and 9890).

Senator Vandenburg offered the first amendment to the bill which provided:

"Except in a city, town or village where there is no National or State bank regularly transacting customary banking business, no such association shall establish a branch except by taking over a unit bank existing at the time of the enactment hereof or an affiliate of such association" (76 Cong. Rec. p. 2206).

Senator Bratton then proposed another amendment, which when perfected provided:

"(c) A national banking association, may, with the approval of the Comptroller of the Currency, establish and operate new branches within the state in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town or village in which it is situated unless it has a paid in and unimpaired capital stock of not less than $500,000.) (76 Cong. Rec. p. 2205.)

The Bratton amendment was passed with 52 votes for and 17 against with 27 not voting. (76 Cong. Rec. 2208.) Mr. Vandenburg then withdrew his amendment with the comment that "with the geographical limitation in place the other limitation would be inappropriate." (76 Cong. Rec. 2208.) The bill as amended passed the Senate and the 72nd Congress came to an end without action upon the bill by the House of Representatives. During the special session of the 73rd Congress separate banking bills were passed in the House and the Senate. The House bill still contained no provisions for an extension of branch banking. The Senate bill contained the identical provisions which the Senate had previously approved including the Bratton amendment set forth above. (77 Cong. Rec. 3726.)

The Conference Committee reported back its completed bill, the applicable portions which are at issue here being

identical with the present law. (77 Cong. Rec. 5781.) This was enacted into law.

It seems clear that the failure of Congress to incorporate Senator Vandenburg's amendment or a modified version thereof (such as restricting its application to states with similiar requirements) requires a rejection of Walker Bank's theory that Congress intended to impose additional procedural requirements on branch banking by national banks within city limits other than approval of the Comptroller in states expressly authorizing branch banking. It also seems clear that the Conference Committee's action in rejecting Senator Bratton's amendment in the form originally approved by the Senate and retaining the McFadden Act as passed in 1927 as subdivision (1) of 12 U. S. C. Section 36 (c) and then adding a new subdivision (2) authorizing national banks to branch outside the limits of the city where they are situated, subject to additional restrictions (e. g. restrictions as to location and capital requirements) not imposed by the McFadden Act on intracity branches, supports the decision of the District Court (R. 41-42) that the restrictions of subdivision (2) are not applicable to subdivision (1) of 12 U. S. C. Section 36 (c). In leaving the McFadden Act unchanged Congress reaffirmed its position (with regard to intracity branches) that if state law expressly authorizes branch banking a national bank may branch within the limits of the city where it is situated subject only to the Comptroller's approval and without being subject to any other restriction that may be imposed on state banks by state law. As stated by the court in Rushton v. Michigan National Bank, 298 Mich. 417, 299 N. W. 129 (1941):

> "(The state) having made the competition possible, national banks as corporate instrumentalities of the United States created for public purposes need look only to the terms of the National Bank Act for guidance and approval of their actions."

C. The Federal Branch Banking Act does not Impose Identical Restrictions of State Law on National Banks.

As is clearly indicated in the opinion of the Court of Appeals (Tenth Circuit), Congress wanted national banks to have equal opportunity of competition with state banks. But it is respectfully submitted that it was the purpose of Congress to avoid the situation which the Court said is the law. Congress did not want the small bank to be prohibited from branching in its own city where it was necessary to protect its competitive position if a giant state bank had authority under state law to branch in that city. In view of the strong language used by Representative Cannon, supra., it is extremely difficult to understand how plaintiff can rely upon the McFadden Act [as now incorporated into 12 U. S. C. Section 36 (c) (1)] as authority for prohibiting a small unit bank from branching in its own city in a state where a state bank has already branched in that city and can still lawfully branch in that city by consuming a small unit bank and converting it to another branch owned by outsiders.

It is respectfully submitted that the Court of Appeals (Tenth Circuit) decision is that the principle of equality between state and national banks only applies if it appears that the national bank may under a particular situation have a privilege that a state bank does not have in a similar situation elsewhere. The principle apparently does not apply where the national bank is placed at a competitive disadvantage. Under the decision of the Court of Appeals (Tenth Circuit) all banks in Utah have the power to branch in Logan, but The First National Bank cannot branch in Logan. Under the decision of the Court of Appeals (Tenth Circuit) the branches in Logan of outside banks can improve their efficiency in accepting deposits through their established drive-in facilities, but because of physical circumstances The First National Bank

cannot establish such a facility and thus its efficiency in receiving deposits is impaired by the decision of the Court.

The Court of Appeals (Tenth Circuit) seems to ignore the principle that national banks are federal instrumentalities subject to the paramount law of the United States and state law may not impair their efficiency in acting under such law of the United States. The Court of Appeals (Tenth Circuit) uses legislative history of the McFadden Act in an attempt to show that Congress intended to allow the states to prescribe all the restrictions that are to be imposed on national banks. But the McFadden Act was designed to permit national banks to compete with state banks and was not intended to prevent the national banks from competing and Congress left the matter of whether or not a national bank could branch up to the discretion of the Comptroller of the Currency and did not say that a national bank could branch only if it met all the restrictions of state law or the requirements of the state bank commissioner.

If Congress had intended to impose state locatic requirements on intracity branches, Congress would have so stated. If Congress had intended to adopt the merger limitations, the amendment offered by Senator Vandenburg would have been adopted. If Congress had intended that the same restrictions in subdivision (2) were applicable to subdivision (1) of 12 U. S. C. Section 36 (c), the Congressional Conference Committee would not have changed the Bratton Amendment and made two subdivisions instead of one. If Congress had intended identical restrictions of state law should apply to national banks, Congress would have so stated.

Since Congress has made it clear that all that is required is express authority for branching in state law (such as is contained in the second paragraph of Secion 7-3-6, Utah Code Annotated, 1953) and approval of the Comptroller for intracity branches, then this Court should not permit the so-called

"equality" theory of the Court of Appeals (Tenth Circuit) to amend the plain language used by Congress in writing the statute. As has been stated, the exact equality theory expressed by the Court of Appeals (Tenth Circuit) carried to its logical extreme would require national banks to comply with the procedural requirements of the sixth paragraph of Section 7-3-6, Utah Code Annotated, 1953, which deals with state bank commissioner procedural requirements. If Utah state banks are "expressly prohibited" from branching in cities where a unit bank is located unless they take over such bank, they are also "expressly prohibited" from branching until they show to the satisfaction of the state "Bank Commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch office." If the procedural limitations (and the Utah Supreme Court said in Walker Bank v. Taylor, supra., that the fourth paragraph of Section 7-3-6 dealt with a "method" and was not a substantive requirement) of the fourth paragraph of Section 7-3-6 are incorporated into subdivision (1) of 12 U. S. C. Section 36 (c) by the words "expressly authorized," then it is only logical that the procedural requirements of the sixth paragraph are also included. Such an interpretation eliminates the need for a national bank administrator to determine the public necessity and advantage for new branches. Such an interpretation seems to be a long step in the direction of allowing the state bank commissioners to control all expansion of banking facilities in the United States regardless of the desires of the Executive Department of the United States or the needs of the Federal Government.*

*Even in states allowing unlimited branching the approval of the state bank commissioner is required by statute. So in every state permitting branching, national banks would be required to obtain approval of both the state bank commissioner and the Comptroller of the Currency before they could establish a branch within the limits of their own community under the language used by the Court of Appeals (Tenth Circuit).

It is respectfully submitted that the Court should keep in mind the history of the McFadden Act. It was introduced in Congress because the United States Supreme Court said the Comptroller of the Currency could not permit national banks to have teller windows in their own community if the state law prohibited branch banking. The advocates of the bill wanted to permit national banks to have teller windows in their own community in any state regardless of whether or not the state allowed branching. The compromise measure permitted such teller windows only in those states where the state law allowed branch banking. No other restrictions of state law were proposed or enacted by Congress.

The First National Bank of Logan has established a drive-in tellers window in accordance with the provisions of the Federal statute in a state which permits branch banking. Since Congress imposed no other conditions of state law on the establishment of such teller windows, this Court should not permit the decision of the Court of Appeals (Tenth Circuit) to deny such a teller window to The First National Bank. The First National Bank should be given the opportunity to compete with the outside branch of a state bank which has already established such a tellers window in Logan.

Point IV

THE COURT OF APPEALS (TENTH CIRCUIT) INCORRECTLY CITED DECISIONS INTERPRETING 12 U. S. C. SECTION 36 (c) (2) IN DETERMINING THE COMPTROLLER'S AUTHORITY UNDER 12 U. S. C. SECTION 36 (c) (1).

As previously indicated, Walker Bank attempted to broaden the construction of the location restriction in 12 U. S. C. Section 36 (c) (2) and then contended that this restriction is also applicable to subdivision (1). Not only is

plaintiff's contention erroneous, but the cases cited in support of plaintiff's theory are readily distinguishable from the fact situation here.

In the lower Court plaintiff cited Walker Bank v. Taylor, supra., as authority for prohibiting defendant's branch. But the Court in this case did not consider 12 U. S. C. Section 36 (c) (1), and therefore, the facts are not the same as claimed by plaintiff. Dicta in this case reaffirms defendant's position that branching is permitted by state banks in Utah in cities not of the first class as in Logan, Utah. The Court said:

> "The mere presence of a branch bank in a city of the second class . . would not preclude the Commissioner from authorizing the establishment of a branch by another bank."

It is, therefore, clear that Utah law expressly authorizes branch banking in cities of the second class even though there is already a branch of another bank in that city.*

Plaintiff cited four cases as authority for the position that the Comptroller must follow state law in its entirety in ap-

*The Utah Supreme Court also notes in its opinion that the Utah State Bank Commissioner approved the application of Provo State bank on October 25, 1962. So at the time the Comptroller of the Currency approved The First National Bank's branch application on January 17, 1963, the Utah State Bank Commissioner had said Utah State Law permits state banks to branch within their own community where there is no other unit bank they can take over. If later State court decisions which change the legal interpretation of the State Bank Commissioner also change the rulings of the Comptroller of the Currency in interpreting Federal law, it would seem the Comptroller's office will have serious difficulty in administering National banking law. Suppose Bank A applies for a branch in the city where it is located and the Comptroller approves because the State Bank Commissioner says the establishment of such a branch by State banks is authorized by state law. After the branch is established an application is made by Group B to

proving branches of national banks which were relied on by the Court of Appeals (Tenth Circuit). The first case, National Bank of Detroit v. Wayne Oakland Bank, 252 F. 2d 537 (6th Cir. 1958), cert. denied 358 U. S. 830 (1958) involves an entirely different fact situation. Here a state bank had established an outside branch in Troy, Michigan. The National Bank of Detroit, Michigan, also wanted an outside branch in Troy even though the state law contained what the Court considered to be a location restriction which provided that:

> "No such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation."

Consequently, neither state nor national banks could establish a branch in the city of Troy at the time of the application. The District Court found as a fact based on evidence that:

> "The competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to the Wayne Oakland Bank."

No certificate of authority had been issued by the Comptroller to the National Bank of Detroit and the National Bank of

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establish a new unit bank. The Comptroller disapproves because the new branch of Bank A would be adversely affected. Later the State Supreme Court says the State Bank Commissioner was wrong. Bank A is forced to close its branch that has been serving its customers for a number of years. Group C then asks for permission to establish a new bank. This application is approved because the branch of Bank A has been closed. Group B then brings an action protesting the approval because the Comptroller should have known the State Bank Commissioner's interpretation of the law was incorrect. The Comptroller's burden of regulating national banks and promoting fairness among citizens proceeding under the National Bank Act seems complicated enough without finding that Congress also intended that the Comptroller must be able to predict what state courts may do to the legal interpretations of the State Bank Commissioners.

Detroit had not established a branch in Troy. Plaintiff did not explain how a case involving a requested outside branch under the authority of 12 U. S. C. Section 36 (c) (2), in a city where no state banks could at the time establish branches, where the existing state banks will suffer inestimable damage where no certificate of authority had been issued and where no branch had been established by the national bank is authority for the situation here where the action is governed by 12 U. S. C. Sec. 36 (c) (1), any state bank has a legal right at this time to establish a branch in Logan, Utah, the stipulation of facts does not show that any damage will be suffered by the plaintiff bank, a certificate of authority was issued on January 21, 1963, and a branch bank has been established and operated by the defendant since said date.

All the Court decided in National Bank of Detroit v. Wayne Oakland Bank, supra., is that if a state bank could not establish a branch located in a particular city at the time the national bank desired to branch there, then the national bank was barred by the location restriction in 12 U. S. C. Section 36 (c) (2) from establishing a branch in that city at that time. Since the Court did not find all restrictions of state law were incorporated by the portion of the statute which requires affirmative authorization for branch banking in the statute law of the state, it seems obvious the Court would not have said that national banks have "no greater rights" than state banks if there was no location restriction in the Federal statute.* Since subdivision (1) of 12 U. S. C. Section 36 (c) contains no location restriction, the Courts should not cite cases involving outside branches as authority for imposing additional restrictions on inside branches. It seems unreasonable to suppose that Congress intended inside branching to be subject to

*Judge Fox said the Court of Appeals (Sixth Circuit) did not say that all restrictions of state law are incorporated in 12 U. S. C. Section 36 (c) See American Bank & Trust Co. v. Saxon, supra.

more restrictions than outside branching when it imposed no specific restrictions on inside branching and since Congress recognized that inside branching did not involve the monopoly situation Congress was trying to avoid.

Plaintiff cited Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770 (D. D. C. 1959) aff'd per curiam 108 App. D. C. 37, 278 F. 2d 871 (D. C. Cir. 1960), but this case also involves 12 U. S. C. Section 36 (c) (2) and not 12 U. S. C. Section 36 (c) (1) because it also involves a proposed branch outside the city where the national bank is located, there was also an existing branch of a state bank in the village where the proposed branch was to be located and thus the Michigan law quoted in National Bank of Detroit v. Wayne Oakland Bank, supra., was applicable. In addition no state banks could at the time establish branches in this village (so the location restriction of 12 U. S. C. Section 36 (c) (2) barred the branch), there is a finding that the existing state bank will suffer damage, no certificate of authority had been issued and no branch bank had been established by the national bank. Plaintiff should not be permitted to use this case as authority for the reasons stated in the preceding paragraphs.

Suburban Trust Company v. National Bank of Westfield, 222 F. Supp. 269 (D. C. N. J. 1963), also involved a proposed branch bank in aonther city than the parent bank and the Court said that since state banks were authorized to branch in a city other than where the state bank was located under state law the national bank could also. While plaintiff cited this case in support of its position in the lower court, it seems the holding supports the defendant's position and not the plaintiff's. Here the certificate of authority had been issued and the branch established by the national bank. The state bank had previously obtained approval to branch but was required to obtain a new certificate of authority when its loca-

tion changed, thus giving the national bank priority. The Court dismissed the complaint of the state bank. It seems to follow from this case that defendant First National Bank having established a branch in a city where branch banking by state banks is authorized, under a valid certificate of authority, it is also entitled to have plaintiff's complaint dismissed.

The plaintiff would have this Court affirm the decision in the cases consolidated herewith for argument (First Security Bank of Utah, N. A. v. Commercial Security Bank, No. 1009; Saxon v. Commercial Security Bank, No. 1126; October Term 1965). As is evident from the record in those cases, the facts are different. In that case the plaintiff, Commercial Security Bank, and the First Security Bank of Utah, both had a principal office and one branch in Ogden and there were two other independent unit state banks. On June 25, 1963, The First Security Bank applied for authority to establish a branch and before the Comptroller approved the application or issued his certificate of authority the Commercial Bank brought action and asked for a temporary restraining order. The uncontroverted affidavit of plaintiff's president was that if First Security Bank was allowed an additional branch the plaintiff would be damaged about $50,000 and would have no adequate remedy at law. The Comptroller did not issue a certificate of authority.

In the opinon of the District Court (236 F. Supp. 457) the procedural limitation of the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953, was incorporated into subdivision (1) of 12 U. S. C. Section 36 (c). The Court relied on the case of Commercial State Bank of Roseville v. Gidney, supra., which involved subdivision (2) as the proposed branch was outside the city where the main bank was located. The Court recognized that different language is used in subdivision (1) as compared to subdivision (2) of 12 U. S. C. Section (c), but made no explanation as to why Congress used different

language or why Congress wrote two subdivisions of the statute if the same restrictions of state law are applicable to both subdivisions.* The Court also ignored the purpose of the McFadden Act which was to provide for the perpetuation of the national (not the state) banking system in that the Court did not recognize that its holding if applied to The First National Bank seriously jeopardizes its competitive life. (Under the Court's interpretation, the McFadden Act, although passed for the benefit of the national banks, actually places The First National Bank in a competitive unequal position as it is the only bank in the State of Utah without power to branch in its own community.) The Court also failed to give consideration to the case of State of South Dakota v. National Bank of South Dakota, 219 F. Supp. 842 (affirmed on other grounds, 335 F. 2d 444 (C. C. A. 8th), cert. den. 85 S. Ct. 667, 379 U. S. 970, 13 L. ed. 2d 562), which held that it is possible in some instances under the more restrictive language of subdivision (2) for a national bank to branch in a situation where a state bank cannot notwithstanding the location restrictions of subdivision (2). This case was also cited by the Court of Appeals (Tenth Circuit) in support of its position even though the holding of the case is in support of the defendant's position and not the plaintiff's. The Court here held that the Comptroller is not subject to state procedural rules as the Court denied an injunction to enjoin establishment of branches outside the city where the national bank was located because the

*The Court made no attempt to answer the arguments by the District Court of Utah that there is a presumption that "Congress did not intend the provisions of subdivision (1) to be superfluous" citing 2 Sutherland Statutory Construction, 3rd, Sec. 4705, p. 339 (1943). (R. 41-42.) See also Jarecki v. G. D. Searle Co., 367 U. S. 303, 81 S. Ct. 1579, 6 L. ed. 2d 859 and United States v. Menasche 348 U. S. 528, 75 S. Ct. 513, 99 L. ed. 615, in which the Supreme Court said that Courts should read a statute so as to give effect to every word and every clause and ought not adopt a reading which makes part of a statute redundant.

state procedural rules were not applicable to the Comptroller of the Currency.

In the cases dealing with the establishment of branches outside the city where the main office is located the Courts have used language stating that Congress intended the same standards to apply to both national and state banks. The reason for this language is understandable because Congress specifically provided that with regard to location restrictions on outside branches the same requirements should apply [see subdivision (2) 12 U. S. C. Section 36 (c) which states "subject to the restrictions as to location imposed by the law of the state on state banks."] When the reason for the language used by the Courts is understood, there appears to be no basis for extending such language to situations involving branches within the same city covered by subdivision (1) of 12 U. S. C. Section 36 (c). Since Congress did not incorporate the restrictions as to location into subdivision (1), there is no basis for using the language of the Courts dealing with subdivision (2) as authority for the position that national banks seeking to establish a branch inside the community where they are located are subject to the location restrictions of state law. At least three courts in addition to the District Court of Utah hav recognized that other than the specified restrictions as to location and capital requirements state procedural rules were not incorporated into subdivision (2) of 12 U. S. C. Section 36 (c) (First National Bank of Smithfield, North Carolina v. Saxon, South Dakota v. National Bank of South Dakota, and American Bank & Trust Co. v. Saxon, supra). Since the language of subdivision (1) of 12 U. S. C. Section 36 (c) is less restrictive than the language of subdivision (2) ("express authority" for branching in state law is all that is required as compared to statute law of the state specifically authorizing branch banks and subject to location and capital restrictions of state law), subdivision (1) should not be construed as incorporating more

restrictive procedural requirements of state law into Federal law than are incorporated into the more restrictive subdivision (2).

CONCLUSION

It is respectfully submitted that based on the foregoing the decision of the Court of Appeals (Tenth Circuit) in the case of Walker Bank & Trust Company, a corporation v. James J. Saxon Comptroller of the Currency; and The First National Bank of Logan, of Logan, Utah, a National banking association, 352 F. 2d 90, should be reversed and the Court should be directed to affirm the decision of the United States District Court for the Northern District of Utah (234 F. Supp. 74) dismissing the plaintiff's complaint on one of two grounds:

1. The United States District Court lacked jurisdiction to hear the case because the plaintiff failed to present proof that it had been or would be damaged by the operation of defendant's branch and therefore the amount in controversy did not exceed $10,000, where such allegation was denied by the defendants in their pleadings.

Or in the event the Supreme Court finds jurisdiction, then

2. The Comptroller of the Currency has authority to permit a National bank to establish a branch within the limits of the city where it is located where the state law expressly authorizes state banks to branch in that city at the time and without requiring the national bank to comply with restrictions of the state law applicable to state banks especially where it is impossible for the national bank to comply with such restrictions.

Respectfully submitted,

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H. Rep. No. 583, 68th Cong., 1st Sess	20, 21
H. Rep. No. 83, 69th Cong., 1st Sess	20, 22
H. Rep. No. 2423, 82d Cong., 2d Sess	29
H. Rep. No. 1221, 89th Cong., 2d Sess	40
Note, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 Yale L. J. 502	37
Operating Banking Offices Insured by the Federal Deposit Insurance Corporation as of January 1, 1966	5
Rand McNally Census Book (1961 ed.)	7
S. Rep. No. 473, 69th Cong., 1st Sess	21, 22
S. Rep. No. 584, 72d Cong., 1st Sess	23, 25
S. Rep. No. 1623, 82d Cong., 2d Sess	29
S. Rep. No. 1095, 84th Cong., 1st Sess	40

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 51

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

WALKER BANK & TRUST CO., A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73

FIRST SECURITY BANK OF UTAH, N.A., PETITIONER

v.

COMMERCIAL SECURITY BANK

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the court of appeals in No. 51 (Logan R. 48–56)[1] is reported at 352 F. 2d 90, and the

[1] The reference "Logan R." is to the printed record in this Court in No. 51. Similarly, the record in No. 73 will be referred to as "First Security R.", and the record in No. 88 as "Saxon R."

opinion of the district court (Logan R. 37–45) at 234 F. Supp. 74. In Nos. 73 and 88, the court of appeals issued no opinion other than its judgment (First Security R. 35–36, Saxon R. 38–39), which is unreported, and the opinion of the district court (First Security R. 25–33, Saxon R. 28–36) is reported at 236 F. Supp. 457.

JURISDICTION

The judgment of the court of appeals in No. 51 was entered on October 26, 1965 (Logan R. 57), and a petition for rehearing denied on December 3, 1965 (Logan R. 58). The petition for a writ of certiorari was filed on January 4, 1966, and granted on May 2, 1966 (Logan R. 58, 384 U.S. 925). In its order allowing certiorari, this Court directed that No. 51 be consolidated with Nos. 73 and 88.

In Nos. 73 and 88 (which were consolidated below), the judgment of the court of appeals was entered on November 18, 1965 (First Security R. 35–36, Saxon R. 38–39). In No. 73 the petition for a writ of certiorari was filed on February 11, 1966, and granted on May 2, 1966 (First Security R. 36, 384 U.S. 925). In No. 88, Mr. Justice Fortas on February 16, 1966, extended the time for filing a petition for certiorari to and including March 16, 1966 (Saxon R. 39). The petition was filed on March 16, 1966, and granted on May 2, 1966 (Saxon R. 40, 384 U.S. 925).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The National Bank Act authorizes the Comptroller of the Currency to approve the establishment of new

branches by a national bank within its home municipality if such establishment is authorized to State banks by the laws of the State where the national bank is located (12 U.S.C. 36(e)(1)). The question presented is whether, in authorizing the establishment of a branch office by a national bank, the Comptroller is bound by a provision of the laws of the State in which the national bank is located that permits State banks to establish branches in cities and towns anywhere in the State, but only by taking over existing banks.

STATUTES INVOLVED

The statutes involved are 12 U.S.C. 36(c) (National Bank Act) and Section 7–3–6, Utah Code Ann., 1953, as amended. Their pertinent provisions are printed in App. A, *infra,* pp. 44–46.

STATEMENT

The National Bank Act, as amended, 12 U.S.C. 36 (c), permits a national bank, with the approval of the Comptroller of the Currency, to establish new branches (1) in the city, town or village where its main office is located, if State law expressly authorizes State banks to establish branches in their home municipalities (branch offices located in the parent bank's home municipality are known as "inside" branches); and (2) elsewhere in the State if State law expressly authorizes State banks to establish such branches ("outside" branches), "subject to the restrictions as to location imposed by the law of the State on State banks." App. A, *infra,* p. 44. The subsection directly relevant here is (1).

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The law of Utah (Section 7–3–6, Utah Code Ann., 1953; App. A, *infra*, pp. 45–46) authorizes State-chartered banks to establish branch offices within the corporate limits of any city or town in the State. However, except in cities of the "first class" (of which Salt Lake City is the only one), a State bank may establish a new branch only by taking over an existing bank if at least one bank is located there. Only where a city or town has branch banking offices but no principal office of a bank is the "take over" restriction inapplicable. *Walker Bank & Trust Co.* v. *Taylor,* 15 Utah 2d 234, 390 P. 2d 592. The issue presented here is whether the "take over" restriction of Utah law is incorporated in the National Bank Act as a limitation upon the Comptroller's authority to approve the establishment of national-bank branches in Utah.

Facts in No. 51. On or about November 9, 1962, the First National Bank of Logan, Utah, applied to the Comptroller of the Currency for authority, pursuant to 12 U.S.C. 36(c), to establish and operate a branch within the corporate limits of the City of Logan, Utah, where the bank maintains its principal office (Logan R. 12–13). Logan has a population of approximately 20,000. As cities are classified under the law of Utah (Section 10–1–1, Utah Code Ann., 1953), it is a city of the second class (Logan R. 12).

On January 21, 1963, the Comptroller issued a certificate authorizing the establishment of the proposed branch and the national bank began transacting business there. In establishing this branch the national bank did not take over an existing bank (Logan R. 13). Although there were two branches of outside

banks, the national bank was the only bank having its principal office in Logan (Logan R. 3, 13).

At the time, Walker Bank & Trust Company, a banking corporation chartered by the State of Utah, had its principal office in Salt Lake City, Utah (Logan R. 11), and, in addition, approximately fourteen branches throughout the State of Utah (see *Operating Banking Offices Insured by the Federal Deposit Insurance Corporation as of January 1, 1966*), including a branch in Logan (Logan R. 13). Walker Bank had established its branch in Logan by acquiring a State bank in 1956 (Logan R. 12).

On July 9, 1963, Walker brought an action against the Comptroller and the First National Bank of Logan in the United States District Court for the District of Utah for a declaratory judgment that the establishment and operation of the branch were unlawful, and for injunctive relief (Logan R. 1–5). Walker alleged that the national bank in establishing its branch in Logan had not taken over an existing bank, and that such establishment was therefore prohibited by Utah law, made applicable to national banks by 12 U.S.C. 36(c) (Logan R. 4–5).

The case was submitted to the court on stipulated facts (Logan R. 35–36). In a memorandum decision entered on September 30, 1964, the district court first noted, citing *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 390 P. 2d 592, that under Utah law a bank may not open a branch in its home city if it is the only bank having its main office there, since in such a case the law requires that branching be by take-over but by definition there is no other bank to

acquire (Logan R. 39, n. 3).[2] However, the court reasoned, since Utah law expressly authorizes State banks to establish branches in cities and towns anywhere in the State, the conditions of Section 36(c) of the National Bank Act for the establishment of "inside" branches were satisfied and the national banks of the State free to branch (Logan R. 37–45, 234 F. Supp. 74). Judgment was accordingly entered dismissing the complaint (Logan R. 45–46).

The Court of Appeals for the Tenth Circuit reversed (Logan R. 48–56, 352 F. 2d 90), holding that "all the State law an branch banking" and "not just part of it" is incorporated in the National Bank Act and thus applicable to the establishment of branches by national banks (Logan R. 56, 352 F. 2d at 94).

Facts in Nos. 73 and 88. On or about June 25, 1963, First Security Bank of Utah, a national bank, filed an application with the Comptroller for authorization, again pursuant to 12 U.S.C. 36(c)(1), to establish and operate a branch bank within the corporate limits of the city of Ogden, Utah, where the bank maintains its principal office (Saxon R. 23). The bank proposed to establish the branch by opening a new office, rather than by purchasing or otherwise taking over an existing bank. Commercial Security Bank, a Utah banking corporation, has its principal place of business, and one branch, in Ogden; two other

[2] If there were no independent banks at all in Logan, but only branches, any bank could open a branch office there. See p. 4, *supra*. But First National, of course, had its main (and only) office there. Hence the take-over restriction was applicable. *Walker Bank & Trust Co.* v. *Taylor*, *supra*.

banks also have their main offices there (Saxon R. 23). Although more than 140,000 persons reside in the metropolitan area of Ogden, the population of the city itself is approximately 70,000.[3] It is therefore classified under Utah law (Section 10–1–1, Utah Code Ann., 1953) as a city of the second class.

On July 18, 1963, Commercial Security Bank sued the Comptroller of the Currency for declaratory and injunctive relief, alleging that the establishment of the proposed national-bank branch in Ogden was prohibited by Utah's take-over provision, which, it contended, was applicable to national banks by virtue of 12 U.S.C. 36(c) (Saxon R. 5). On June 9, 1964, the Comptroller approved the national bank's application to branch.[4] The national bank then intervened in the suit as a party-defendant.

On December 18, 1964, the district court issued a memorandum opinion holding that all restrictions imposed by State law on branch banking are applicable to national banks (Saxon R. 28–35), and enjoining the Comptroller from authorizing the national bank to open the proposed branch in Ogden (Saxon R. 36). The national bank and the Comptroller appealed. The appeals were consolidated, and the court of appeals, without opinion, affirmed the district court's decision on the authority of the opinion rendered a few days before by the Tenth Circuit in the Logan case.

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[3] Population figures are from the 1960 Census of Population, U.S. Dept. of Commerce, p. 46–14, and the 1961 edition of the Rand McNally Census Book, p. 45.

[4] However, owing to the pendency of Commercial Security's action, no certificate of authority was issued.

ARGUMENT

Introduction and Summary

The National Bank Act permits a national bank (with the approval of the Comptroller of the Currency) to establish and operate new branches within the limits of the city, town, or village where it is located, provided that such establishment and operation are authorized to State banks under the laws of the State in question. 12 U.S.C. 36(c)(1). The State of Utah permits its banks to establish and operate new branches within the limits of their home municipalities (and indeed in cities and towns throughout the State), but only by taking over an existing bank; the opening of a new office is forbidden. The question is whether such a restriction upon branch banking is, by virtue of the provisions of Section 36 (c)(1), applicable to national banks located in Utah. We urge that it is not.

The language and design of the federal statute are inconsistent with the view that such a restriction is among those Congress gave deference in the National Bank Act, and support the view of the Comptroller of the Currency that (apart from capitalization requirements not pertinent here) the only restrictions of State law that are binding upon the Comptroller and the national banks are those prescribing whether and where a State bank may branch—that is, provisions permitting or prohibiting branching and, with respect to branches outside the bank's home municipality, restrictions as to the location of branches. See *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267 (C.A. 4). To read the

statute as incorporating State branch banking law in its entirety—the view of the courts below—would render meaningless the key provisions of the statute, which expressly incorporate some but not all restrictions of State law. However, we do not stop with a consideration of the statutory text. We show that a construction that would subject national banks to restrictions like that at bar cannot in any event be reconciled with the legislative intent.

The issue whether to permit national banks to branch deeply divided the successive Congresses that considered it. Some legislators believed that the national banks should enjoy unlimited branching authority (subject only to approval by the Comptroller of the Currency) without regard to the branch-banking policies of the States, most of which forbade altogether, or strictly limited, branching. Others in Congress, however, were deeply antagonistic to branch banking. They believed that, if national banks were given unrestricted branching power, those States that in their own banking systems had rejected or circumscribed branch banking might be unable to effectuate their policies. The national banks, in their view, might enjoy a competitive advantage so great as to force such a State to choose between relaxation of its policies and impairment of its banking system.

The evils that opponents of branch banking saw were basically threefold: absentee ownership of a community's banking resources; domination of rural banking markets by the more affluent urban banks; and monopolization of a State's banking system by a

few powerful banks having offices throughout the State. These concerns were interrelated and could be summed up in one word: concentration. The opponents of branch banking—like the later sponsors of strict anti-merger legislation applicable to the economy as a whole [5]—feared that a traditional economic order characterized by competition among many independent units, none very large, was threatened; that, given the power to branch, the larger banks would absorb or drive out the smaller, ending the American system of "unit" banking and replacing it with the "central" banking system characteristic of European nations. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 325.

The proponents of branch banking for the national bank system eventually prevailed, but not before making certain concessions to the opponents. The essence of the compromise between the two groups was that the national banks were to be subject to those (but only those) State laws prescribing whether and to what extent State banks could branch. If a State forbade branching altogether, national banks located in the State could not establish branches either. If a State permitted the establishment of branches only within a bank's home municipality, or imposed restrictions upon the location of branches outside the home area, the national banks of the State would also be bound. In this fashion, laws designed to limit the

[5] 64 Stat. 1125 (Celler-Kefauver Anti-Merger Act), amending Section 7 of the Clayton Act, 15 U.S.C. 18. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226.

growth of banks through branching, passed by States that viewed branch banking as dangerously conducive to undue concentration and centralization of banking power, would establish limits for branching by national banks located within the State as well, while in those States where branching was freely permitted, national banks would likewise be free.

Congress did not, however, make all State laws touching the subject of branch banking applicable to national banks. To do so would not have been consistent with the congressional purpose. Congress—whose basic determination was to *increase* the branching powers of the national banks—sought merely to placate opponents of branch banking by deferring to those States which forbade branching or limited its extent—not to adopt the complete body of each State's laws relating to branching. It is demonstrable that many State laws which purport to limit branch banking in fact do no such thing. The provision here in question, for example, in restricting the method of branching to the taking over of existing banks, but not otherwise setting any limits upon branching, actually fosters the very danger—undue concentration—that the opponents of branch banking feared.

Absentee ownership is encouraged, since a bank is free to enter any locality if it can purchase an existing bank, thereby eliminating from the scene the existing owners of the bank (who may be local). Urban domination of rural banking markets is also encouraged, since a bank is free to take over smaller banks in any city or town in the State. And, to the extent that bank branching may foster monopoliza-

tion of the State's banking resources, the Utah provision does so, for no limit is placed on the number of bank outlets that one or a few banks may own. Thus, far from being designed to limit the concentration and centralization of the State's banking industry through branching, Utah's take-over limitation promotes those tendencies.

In attempting an accommodation with the opponents of branch banking, Congress surely did not propose deference to provisions of State law calculated not to avert but to promote the dangers associated (in the minds of opponents) with unrestricted branch banking. To make such provisions bind the Comptroller would distort the purpose of Congress as well as its language. Furthermore, to assume that Congress incorporated such a restriction supposes—we think quite unrealistically—that Congress silently intended to work a fundamental change in its consistent policies toward competition in the banking industry. As in other areas, Congress in the banking field has, in a variety of enactments, ordained a policy (albeit a qualified one) of competition. Utah's take-over limitation, as we demonstrate, is peculiarly anti-competitive in effect, and hence opposed to this policy.[8]

[8] We do not, of course, suggest that all State laws which foster branch banking are necessarily anti-competitive. Branch banking may promote healthy competition by increasing the total number of competing bank outlets in each banking market (see pp. 41–43, *infra*). We urge only that a provision which precludes the establishment of new branch offices, and channels branching exclusively into acquisition of existing banks, is harmful to competition.

A final introductory word is in order. A basic premise of our argument throughout is that Congress, in legislating with respect to branch banking, has paid at least some heed to the views of those who are opposed to the practice. In suggesting that such views are therefore relevant in deciding whether a State branching restriction is applicable to national banks, we have no occasion in this brief to "take sides" in the basic controversy over the desirability *vel non* of branch banking. For, to repeat, the restriction in question here does not express or arise from the State antibranching policies to which Congress, in conferring branching authority upon the national banks, was prepared to defer.

I

THE NATIONAL BANK ACT WAS INTENDED, NOT TO MAKE ALL STATE LAWS RESPECTING BRANCH BANKING BINDING UPON NATIONAL BANKS, BUT TO GIVE EFFECT TO A STATE'S DECISION TO PROHIBIT, OR TO LIMIT THE EXTENT OF, BRANCH BANKING

The National Bank Act authorizes national banks to "establish and operate new branches" within the limits of the city, town or village where the bank is located, "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." And in substantially the same language it permits national banks to branch outside their home municipality anywhere in the State, if such branching is affirmatively authorized to State banks by State law, "subject to the restrictions as to location imposed by the laws of the State on State banks" (and subject also to State-law re-

quirements, not in issue here, as to minimum capitalization). 12 U.S.C. 36(c).

The courts below read this language to mean that all of the limitations a State may impose on the establishment of new branches by State banks are equally applicable to the national banks located in the State. By the provision in question here, the State of Utah has authorized its banks to establish and operate new branches within the limits of the cities or towns where they are located—and, indeed, in cities and towns throughout the State—but (with immaterial exceptions) only by taking over existing banks. The courts below hold that this limitation upon the method of establishing a new branch is binding upon the national banks located in Utah, since, in their view, the entire corpus of State law relating to branching is binding upon the national banks within the State. We challenge this conclusion.

In this part of our argument, we address ourselves to the basic issue of what provisions of State law with respect to branch banking may be deemed incorporated in the National Bank Act as limitations upon the branching powers of the national banks in the State. Reviewing the legislative history and background of 12 U.S.C. 36(c), we derive its basic purpose: to defer only to State laws based upon the fear that branch banking leads to an undesirable concentration of a State's banking industry, and which—by prescribing whether and to what extent branching may be engaged in—seek to forbid or circumscribe

the practice accordingly. We suggest below that State branching restrictions, like the Utah provision here, which do not place limits upon the extent of branching but regulate only the method of branching (and that in a way calculated to promote undesirable concentration of the State's banking resources), cannot, consistently with the congressional purpose, be held to bind the national banks. But, preliminarily, we show that the view of the courts below that *all* State restrictions are incorporated in Section 36(c)(1) is, in any event, refuted by the statutory text.

A. THE LANGUAGE AND DESIGN OF THE NATIONAL BANK ACT ARE INCONSISTENT WITH THE VIEW OF THE COURTS BELOW THAT ALL STATE LAW RESTRICTIONS AS TO BRANCH BANKING ARE INCORPORATED IN THE ACT, AND SUPPORT THE COMPTROLLER'S VIEW THAT ONLY STATE LAW PROVISIONS CONCERNING WHETHER AND WHERE BRANCHES MAY BE ESTABLISHED BIND NATIONAL BANKS

1. The National Bank Act provides that the Comptroller may authorize a national bank to establish and operate new branches within its home municipality if such establishment and operation are expressly authorized to State banks by State law. If the State forbids its banks to establish branches within their home municipalities, national banks are likewise foreclosed. But if, as in the case of Utah, the State authorizes State banks to establish branches in their home cities, the language of Section 36(c)(1) strongly suggests that the national banks may establish such branches without regard to additional restrictions that the State may impose upon the manner, rather than the extent, of branching. There is no indication in the statutory text that a State may dictate, not only

whether national banks shall be permitted to branch, but also by what methods or procedures.[7]

Indeed, to read the statute as incorporating all State law restrictions upon branch banking would deny it a rational design. Section 36(c)(2) deals with the establishment by national banks of branches located "at any point within the State" in which the bank is located. In language very similar to Section 36(c)(1), it authorizes the Comptroller of the Currency to approve the establishment and operation of such branches if State banks are similarly authorized. It further provides, however, that the Comptroller shall be "subject to the restrictions as to location imposed by the law of the State on State banks." This provision would be wholly superfluous if the view of the courts below prevailed—for why specify that restrictions as to location are applicable, if the statute makes all State restrictions on branching applicable to national banks? Nor, if their view is sound, was it necessary or appropriate to provide specifically—as Section 36(c)(2) proceeds to do—that a national bank may not establish a branch outside its home municipality unless it meets the capitalization requirements imposed by State law upon State banks. It cannot be presumed that these provisions of the National Bank Act which expressly incorporate specific aspects of State law have no function in the scheme

[7] Where Congress has desired to incorporate all the law of the State relating to a banking question, it has done so expressly. See 12 U.S.C. 36(b): "The Comptroller of the Currency may not grant approval * * * if a state bank * * * would be prohibited * * * from * * * operating * * * an identically situated office * * *." See, also, 12 U.S.C. 85, 92a(a), 371.

of the statute.[8] Plainly, the language and structure of Section 36(c) do not envisage that national banks shall be subject to all of the restrictions on branching imposed by State law. See *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267 (C.A. 4); *Rushton, Attorney General* v. *Michigan National Bank*, 298 Mich. 417, 299 N.W. 129; cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328; *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 413, n. 1.

2. On the contrary, the statutory language and design support the view of the Comptroller that (with the exception of capitalization requirements, not in issue here) the only State law restrictions which bind him are those forbidding branch banking altogether or limiting it geographically.[9] For these are the only restrictions expressly made applicable to the national banks by 12 U.S.C. 36(c).[10] Thus, this Court has de-

[8] "We would not lightly conclude that a Congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 * * *." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560.

[9] Because 12 U.S.C. 36(c)(1) contains its own geographical restriction (corporate limits of the municipality in which the bank is located) and contains no "restrictions as to location" clause, the Comptroller takes the position that State-law restrictions as to location do not apply to the establishment of inside branches under (c)(1), albeit they apply to outside branches under (c)(2). See *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233 (N.D. Ind.), appeal pending, C.A. 7, Nos. 15561 and 15562.

[10] Since the national banks are federal instrumentalities, their powers are not limited by State law save as clearly provided by Congress. *E.g.*, *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558–559; *Franklin National Bank* v. *New York*, 347 U.S. 373; *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 557.

scribed the State-law branch banking restrictions which are applicable to national banks as "geographical limitations." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 328; *Whitney National Bank* v. *Bank of New Orleans,* 379 U.S. 411, 413, n. 1. And in *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267, the Fourth Circuit recently rejected a contention that the Comptroller was required to have "ascertained to his satisfaction * * * that the establishment of such [branch] * * * will meet the needs and promote the convenience of the community" because State law required the State banking commissioner to make such a determination before authorizing establishment of a State bank branch, holding that "the phrase 'restrictions as to location' does not advert to economic factors of need and convenience, but refers exclusively to a geographical determination" (352 F. 2d at 271). Accord: *Rushton, Attorney General* v. *Michigan National Bank,* 298 Mich. 417, 299 N.W. 129.

Under this view, the take-over limitation of Utah law—which is of course not geographical—would not bind the national banks.[11] For purposes of deciding the present case, however, this Court need not adopt in its full breadth the Comptroller's view that he is bound only by State laws as to whether and in what locations branching is permissible. For even assuming that certain State limitations upon branching that do not appear to be strictly geographical may be within the congressional intent in according deference

[11] Respondent Commercial Security Bank suggests (Br. in Opp. 13) that the Utah provision in issue here is a "restriction as to location." This position is different from that of the

to some State-law branching restrictions, the take-over provision of Utah law, we shall demonstrate, is a non-geographical restriction that does *not* embody the kind of State branching policy which Congress, by proposing deference, intended to protect. Under any view, therefore, it is outside the scope of Section 36(c). We begin this branch of our analysis by considering the background and purpose of that section.

B. THE CONCERN OF CONGRESS IN SUBJECTING NATIONAL BANKS TO CERTAIN LIMITED RESTRICTIONS IMPOSED BY THE STATES ON BRANCH BANKING WAS DIRECTED AT THE UNDUE CENTRALIZATION AND CONCENTRATION OF BANKING POWER AND RESOURCES THAT OPPONENTS OF BRANCH BANKING FEARED

1. Prior to the McFadden Act of 1927, 44 Stat. 1224, national banks were not permitted to establish any branch offices. *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640; see Revised Statutes, §§ 5134, 5190. State banks, however, were free to branch where State laws permitted,[12] and the result was to put the national banking system at a sharp competitive disadvantage vis-à-vis State banks. Concern with the impact of State branch banking upon

courts below, which ruled that the Comptroller is bound by "all the State law on branch banking not just a part of it" and that Congress intended that "the measuring stick of national branch banks is state law" (Logan R. 52, 56), and in any event has no merit. Utah authorizes State banks to establish branches in cities and towns anywhere in the State. A State bank was free to establish branches in Logan and Ogden, the cities in issue here, so long as it did so through acquisition. The take-over provision thus imposes no territorial or geographical limitation, and is clearly not a restriction upon the "location" of a bank branch.

[12] In addition, a State bank that converted into a national bank could keep any branches it might have. Revised Statutes, § 5155.

the national banking system led the Comptroller of the Currency, in his 1923 and 1924 annual reports to Congress, to advocate that national banks be given a limited authority to operate through branches. The Comptroller took note, however, of the opposition to branch banking in many parts of the country.[18] It was believed that, in a system which permitted banks to extend their operations through the opening or acquisition of additional offices, the inevitable tendency was an undesirable concentration and centralization of banking resources. Under such a system, it was feared, the industry would become dominated by a few disproportionately large and powerful banks, remote from the people and businessmen of the localities in which they had offices. The Comptroller's proposal—to allow branching only within the limits of the city or town where the bank was located—was designed to allay such fears. The alleged dangers of absentee ownership and control of a community's banking resources, urban domination of rural bank markets, and undue centralization of a State's banking industry would be averted by confining each national bank to its home municipality.

In 1924 and again in 1926, the House Banking and Currency Committee reported out bills to authorize national banks to establish branches in their home municipalities. See H. Rep. No. 583, 68th Cong., 1st Sess.; H. Rep. No. 83, 69th Cong., 1st Sess. These bills contained a further concession to the opponents

[18] Annual Report of the Secretary of the Treasury for 1923, Report of the Comptroller of the Currency, p. 742; *id.* for 1924, pp. 609, 611.

of branch banking: national banks were to be permitted to establish branch offices only in those States that authorized State banks to do so. H. Rep. No. 83, *supra*, p. 4; S. Rep. No. 473, 69th Cong., 1st Sess., p. 8. There was still opposition on the part of antagonists of branch banking (see 67 Cong. Rec. 2829–2860, 3225–3253, 8299), but supporters of the bill could argue persuasively that it was carefully drafted to avoid their apprehensions. Not only would the national banks be foreclosed from establishing branches in States that forbade their own banks to do so; in addition, it was pointed out, the limitation of branching to the cities would protect small communities from absentee ownership of banking facilities, with the loss of personal contact in banking services thereby entailed. So limited, the branching authority conferred by the bill would not produce undue concentration of banking power, since there was ample capital in the cities to assure that there would be enough banks to maintain effective competition. See 67 Cong. Rec. 3240–3241; see, also, *id.*, p. 2832.

As finally enacted, moreover, the McFadden Act forbade national banks to establish branches in cities having a population of less than 25,000. In cities of between 25,000 and 50,000 one branch was to be permitted and in cities of betweeen 50,000 and 100,000 two. 44 Stat. 1224, 1228.[14] Subject to these restrictions, national banks could establish branches in their

[14] This provision was repealed in 1933, 48 Stat. 162, 190, and replaced by federal minimum capitalization requirements, which, as later amended, now appear in 12 U.S.C. 36(d).

home cities "at the discretion of the Comptroller" if home-city branching was authorized to the State banks of the State. S. Rep. No. 473, 69th Cong., 1st Sess., p. 8; 68 Cong. Rec. 5816 (remarks of Congressman McFadden).[15]

In this fashion—deferring to the sensibilities of the individual States on the delicate issue whether branch banking should be allowed by permitting national banks to establish only home-city branches and then only in cities where State banks were permitted to do so—Congress sought to mitigate the "intolerable" disparity in branching powers as between State and national banks that had been created by the national banks' lack of authority to branch (H. Rep. No. 83, 69th Cong., 1st Sess., p. 7), while avoiding most of the dangers thought to stem from branch banking.

Section 36(c)(1) of the National Bank Act, relating to "inside" branches (such as are involved in the present case), is a reenactment of the key branching

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[15] The Senate Committee stated (S. Rep. No. 473, *supra*, at p. 10):

"* * * your Committee is of the opinion that the bill is sufficiently restrictive when it declares unlawful the establishment of branches by national banks in any city in which the State banks are denied that right by State law and properly permissive when it permits national and State member banks to have branches in any city in which it is lawful for State banks to have branches."

The McFadden Act as finally passed also contained a provision limiting the power of State member banks of the Federal Reserve System to retain and operate branches beyond the limits of the city, town or village where the bank's principal office was located.

provision of the McFadden Act (Section 7(c)).[16] But we do not on that account limit our consideration of legislative history to the 1927 Act, for within a few years Congress modified the policies underlying that Act, further enlarging the branching authority of national banks by removing the absolute ban on "outside branches."

2. The growing number of bank insolvencies in the late 1920's, and the panic following the stock market crash of 1929, stimulated a thorough investigation of the entire national and Federal Reserve banking systems by the Senate Banking and Currency Committee, culminating in the Banking Act of 1933 (Glass-Steagall Act), 48 Stat. 162. Among the many banking matters covered by the Act was the problem of branch banking.

The committee believed that bank insolvencies had been a major cause of business distress throughout the country and that "a larger experiment with branch banking" was "essential" to prevent future insolvencies. S. Rep. No. 584, 72d Cong., 1st Sess., p. 11. Accordingly, the committee proposed to authorize national banks to establish branches "not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State

[16] Section 7(c), 44 Stat. 1228, provided:

"A National banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question."

laws." Limited branch banking across State boundary lines was also to be permitted.

This proposal rekindled the same intense controversy over the merits of branch banking that had attended the deliberations leading to the McFadden Act. The author of the bill, Senator Glass, vigorously defended its branch banking provisions.[17] If Statewide branching were permitted, he argued, greater diversity of investment opportunity and greater capitalization would tend to prevent bank failures. A larger banking system would be able to attract and hold competent, skilled personnel. And the provisions permitting branching, he contended, would bring sound banks, with ample credit facilities to many communities lacking adequate banking services.

As for the opposition's contention that his proposal would invade the sovereign rights of the States, he replied, first, that the national government had full authority to regulate the national bank system and that the National Bank Act itself had once imposed a

[17] 75 Cong. Rec. 9890–9899. Noting that 90 percent of the bank failures between 1921 to 1931 had occurred in towns of fewer than 25,000 people, he asserted that the problem was largely one of rural bank failures (75 Cong. Rec. 9892). Economic changes, and particularly the centralization and concentration of industry and commerce, he argued, had curtailed the opportunities for small country banks. Lack of opportunity for diversified investments and under-capitalization had weakened country banks but broadened the opportunities for large metropolitan banks. Weak country banks could not attract expert bank managers and skillful officials, were unable to meet the needs of their communities, and were prime candidates for failures (*id.*, pp. 9896-9897).

prohibitory tax upon State banks which had been sustained by the Supreme Court as constitutional,[18] and, second, that any competitive advantage in regard to branching given national banks by his bill could, and probably would, be remedied by the States' authorizing State-wide branch banking to State banks. Lastly, he noted that there were no compulsory provisions in the bill, and that a national bank would not establish a branch in a community unless it believed that the community needed and desired it.

The opponents of the branching provisions of the Glass bill raised numerous arguments against them. For example, Senator Norbeck, the Chairman of the committee, filed a minority report "in protest against the proposed extension of branch banking." S. Rep. No. 584, *supra,* Part II. He opposed the branch banking provisions primarily on the grounds that they would foster undue centralization of banking power and lead to a nationwide system of branch banking. *Id.,* pp. 3, 4–6. He made reference to the "great desire on the part of certain people to wipe out the State banking system," and to a movement "to control the banking industry of the United States by centralization" which "might be termed not only national but international" and which would accomplish its ends "through nationwide branch banking and the complete elimination of the unit bank." *Id.,* pp. 1, 3.

[18] See *Farmers' and Mechanics' National Bank* v. *Dearing*, 91 U.S. 29, 33–34.

Opposition on the floor of the Senate to the branching provisions of the Glass bill was intense[19] and prolonged. It was maintained that to permit State-wide branching by national banks would as a matter of competitive necessity force branch banking upon the States—that or cause the demise of the State banking systems—even though all but 10 or 12 States forbade

[19] See, *e.g.*, remarks of Senator Bratton (76 Cong. Rec. 1449–1450):

"I believe that one of the major contributing causes to the difficulty in which we find ourselves is the accumulation, the concentration of too much wealth in too few hands. It is not a sudden condition; it is not one consequent upon developments in the last few months or the last few years. It is a crystallization of a definite movement covering many years, resulting in the accumulation of too much wealth in too few hands.

"Indeed, Mr. President, we have reached a condition where a half dozen Americans could, whether through fear or otherwise, close their purse strings and involve the whole country in a panic. That is not a wholesome condition. We should undertake to stem the tide. We should endeavor to minimize it. But instead of doing that, it is proposed now that we authorize the national-bank system of the country to take a step farther than we have ever gone before. We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not.

"Mr. President, it is easily conceivable that if we go that far, in the course of 10 years or less three or four powerful banking institutions may control the banking system of the country. If the fear I entertain is well founded, the extent of the evil consequences cannot be overstated. If in the system lurks the danger I apprehend, its effect upon the country cannot be exaggerated too greatly. Are we willing that three or four powerful organizations, three or four powerful groups of men, three or four powerful groups of money may control the banking facilities of the country? If so, the enactment of [the branch banking provisions of] the bill will contribute to that end."

* * * * * * *

State-wide branching to their banks. See 75 Cong. Rec. 9890, 10055, 13002; 76 Cong. Rec. 1449, 1997, 2079, 2090, 2205, 2206. The dangers if branch banking were permitted to take hold throughout the nation were portrayed by opponents in the same terms as in the debates on the McFadden Act. Once again, the view was expressed that unlimited branch banking led to the domination of the banking industry by a few large banks, to the detriment of small independent banks; fostered absentee ownership of banking facilities, and thereby harmed businessmen forced to deal with banks having no roots in their communities; and contributed to the domination of rural areas, where capital was scarce, by the large cities where banking resources were much greater. Once again, predictions that undue concentration and centralization of banking would result from State-wide branch banking were vigorously advanced as reasons against relaxing the stringent limitations on the branching authority of the national banks. See 75 Cong. Rec. 9973–9982; 76 Cong. Rec. 1333, 2074, 2075, 2146.

Opponents of the bill launched a filibuster, and, after a cloture motion was defeated by a margin of one vote (see 76 Cong. Rec. 1935, 2077), the sponsors of the bill were prepared to compromise. An amendment was proposed, and accepted, permitting State-wide branching by national banks only in States that authorized their own banks to establish such branches, and then "under restrictions as to location imposed by the law of the State on State banks." 76 Cong. Rec. 2079, 2205, 2208. When the location clause was accepted, another proposed amendment, which would

have forbidden branching save by taking over existing banks (76 Cong. Rec. 2080), was withdrawn by its sponsor as inappropriate in light of the location amendment. 76 Cong. Rec. 2208. Having made these concessions, the proponents of branch banking for the national bank system again prevailed.

As Senator Glass, in reporting the bill that was finally enacted, summed up (77 Cong. Rec. 3726):

> * * * We here legislate for a national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand.* * *

And a member of the conference committee explained (77 Cong. Rec. 5896):

> In the controversy over the respective merits of what are known as "unit banking" and "branch banking systems," a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. The system which proves itself the better able to serve the people will in the end prevail.[30]

[30] In 1952 Congress adopted the only major amendment to Section 36(c)(2), making State law requirements as to minimum capitalization of branches applicable to branches of na-

C. A STATE RESTRICTION UPON BRANCHING THAT IS UNRELATED TO CONCERN WITH THE DANGERS OF CONCENTRATION OF BANKING POWER WHICH OPPONENTS BELIEVED INHERENT IN BRANCH BANKING IS NOT INCORPORATED IN THE NATIONAL BANK ACT

The foregoing review of the decade of legislation consideration that preceded enactment of the branching provisions of the National Bank Act in essentially their present form offers considerable guidance in deciding which of the many and diverse restrictions of State law on branching [21] apply to national banks. As finally enacted, the branching provision of the National Bank Act represented a compromise between those who discounted the dangers of branch banking and believed it sound policy to give national banks very broad authority to establish branches, and those who believed that branch banking was undesirable because it promoted (in their view) the concentration of banking power and resources. The essence of the compromise was to defer to State policy in the matter only to the extent necessary to assure that the policies of the anti-branching States would not be undermined.

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tional banks to be located outside their home municipality. Act of July 15, 1952, c. 753, § 2b, 66 Stat. 633. Under the 1933 provisions, in order to establish a branch outside its home city, a national bank was required to have a capital stock of at least $500,000 (with a lesser minimum for States of less than 1 million population); the same requirement was applicable to State banks which were members of the Federal Reserve System. Congress believed the requirement unduly burdensome and removed it, but determined that national banks should be required to meet such minimum capitalization requirements as State law might impose on the establishment of outside branches by State banks. See H. Rep. No. 2423, 82d Cong., 2d Sess., p. 3. See, also, S. Rep. No. 1623, 82d Cong., 2d Sess., p. 3.

[21] We have set forth in App. B, *infra*, pp. 47–52, a summary of the pertinent provisions of the laws of the fifty States on this subject.

If, therefore, a State branching restriction is grounded in concern with the alleged dangers of unlimited branch banking, and designed to avert these dangers by limiting the extent of branching, an argument can be made that it should control branching by the national as well as State banks of the State in question even if the restriction is not among those expressly enumerated in Section 36(c), since it reflects the kind of policy determination that Congress, as the price of enlarging the branching authority of the national banks, agreed to honor. On the other hand, if an ostensible limitation upon banching reflects a different policy, unrelated to concern with the supposed dangers of branch banking, there is no basis whatsoever for assuming that Congress meant to defer to it.

A pair of examples will illustrate. Suppose that a State which subscribes to the view that unlimited branch banking tends dangerously toward concentration decides, nonetheless, that a complete prohibition upon branching would be impractical, and that the conditions of modern finance require a more flexible approach. And suppose that to this end a State authorizes each of its banks to open one, and only one, branch office.[22] The language of Section 36(c) suggests that in these circumstances there would be no operative State limitations upon national banks. On the other hand, it may be argued that a construction that would compel the States to adopt extreme positions regarding the branch banking question—that

[22] The example is hypothetical; no State today has such a limitation.

recognizes no middle ground between a policy of total opposition and one of complete toleration—is not easily reconciled with the purposes of Congress (to which it might be answered, however, that Congress *has* afforded a sufficient middle ground by subjecting national banks to State-law restrictions upon the location of branches).

Let us put a somewhat different case. Suppose a State provides that any bank can establish branches throughout the State if its charter is at least fifty years old. Such a restriction, we submit, cannot be deemed applicable to the national banks of the State. It is designed not to limit the extent of branch banking, but to give a particular class of banks a monopoly of branch banking. It is thus not only outside the statutory language, but also quite irrelevant to the concerns to which Congress was prepared to give deference.[23]

For purposes of deciding the present case, this Court need not resolve the question whether Section 36(c) may be read broadly to achieve results which, while difficult to reconcile with the literal terms of the statute, accord with the policies that underlie it. For, as next we show, the Utah take-over restriction here in issue is incompatible with those policies. Un-

[23] Similarly, State laws that require that the establishment of a branch not adversely affect the profits of existing banks are designed, not to limit the extent of branching, but to limit competition and to protect the profits of existing banks. They, too, are irrelevant to the concerns to which Congress was prepared to give deference.

like a limitation (our first example) upon the number of branches a bank may establish, the Utah restriction is calculated to aggravate the very evils that the opponents of branch banking apprehended when they insisted that Congress defer to the policies of the anti-branching States.

II

THE TAKE-OVER LIMITATION OF THE STATE OF UTAH IS NOT DESIGNED TO LIMIT THE EXTENT OF BRANCH BANKING IN THE SENSE CONTEMPLATED BY CONGRESS IN 12 U.S.C. 36(c); IT IS THEREFORE INAPPLICABLE TO NATIONAL BANKS

The State of Utah has determined that the banks it charters may open new branches, without any limit as to number, in cities and towns anywhere in the State. However, it has provided that a branch may be established only by taking over an existing bank and not by opening new branch offices.[24] The question, of course, is whether this restriction is applicable to the national banks of Utah.

Congress, as noted, has recognized that a particular State might believe that branch banking fosters absentee ownership, urban domination of rural areas, and monopolization of the State's banking industry and has decided to defer if the State, in order to avert such consequences, sets limits upon the extent of branch banking. Where these limits are expressed in the form of a geographical or locational restriction upon the branching powers of State banks, the na-

[24] The take-over limitation does not apply in Salt Lake City and its county. We shall disregard this exception (which is not relevant here) in the following discussion.

tional banks are clearly bound. And it is strongly arguable that such restrictions are the only ones that bind the national banks, not only because the language of the National Bank Act so indicates, but also because by imposing appropriate geographical restrictions a State should be able wholly to avert the three dangers—absentee ownership, urban domination of rural banking markets, and monopolization of a State's banking industry—that unlimited branch banking is said to promote. Additional restrictions need not be implied to permit a State to steer a flexible middle course between complete prohibition and complete permission of branch banking without placing its banks at a competitive disadvantage vis-à-vis the national banks of the State.

In any event, however, it is clear—as we shall now endeavor to demonstrate—that Utah's take-over limitation embodies none of the State policies to which Congress sought to defer in incorporating some State-law restrictions in the National Bank Act. Accordingly, under no proper view of the statute can it be deemed included among those restrictions.[25]

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[25] We pause here to note that none of the decisions cited by respondents (with the exception of the two under review here) support their position. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830, dealt with whether a State statute that imposed territorial limitations upon branching and provided that within these limits a branch could be established only in a city or village in which no State or national bank (or branch thereof) was in operation bound the Comptroller. The court held that the provision was a location restriction within 12 U.S.C. 36(c)(2). Utah's take-over limitation has no territorial dimension; in addition, the question whether it binds the Comptroller arises in the context of a national bank's application to open an

1. Utah looks with apparent equanimity upon the prospect that the banking business of particular localities within the State will come to be wholly dominated by banks located elsewhere. Suppose that town X

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inside branch, and 36(c)(1), which regulates inside branches, has no counterpart to the location clause of (c)(2). In *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D. S.Dak.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970, the court held that a regulation of the State Bank Commission fixing a territorial limitation upon branching was inapplicable to the national banks of the State. Other decisions involving the location clause, and clearly inapposite here, are *Community National Bank of Pontiac* v. *Saxon*, 310 F. 2d 224 (C.A. 6); *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D. D.C.), affirmed *per curiam*, 278 F. 2d 871 (C.A. D.C.); and *Union Savings Bank of Patchogue* v. *Saxon*, 335 F. 2d 718 (C.A. D.C.). *Jackson* v. *First National Bank of Valdosta*, 349 F. 2d 71 (C.A. 5), held only that where State law prohibits a bank from having more than one additional "bank office" or "bank facility" in the same city, the State Superintendent of Banks has standing to raise the question whether a national bank's drive-in facility is a "bank office" or "bank facility." To be sure, the court's opinion in that case contains some broad language to the effect that Congress in Section 36(c) established a "policy of equalization" in branching powers as between State and national banks. This phrase was taken from this Court's opinion in *Lewis* v. *Fidelity and Deposit Company*, 292 U.S. 558, 565, where the Court was dealing, not with branch banking, but with the provisions of the Act of June 25, 1930, 46 Stat. 809, which authorized national banks to give security for the deposit of public moneys "of the same kind" as was authorized by the law of the State for State banks. This Court interpreted that statute as placing national and State banks on a parity as to the security which could be given. This does not show that the different language in the branch banking statute brought about a similar parity in branching. True, the Court, in giving examples of such a "policy of equalization," mentioned the branch banking statute, but it never suggested that in that instance a complete equivalence of State and national bank powers had been ordained by Congress.

has four independent banks. There is nothing in the banking laws of Utah that would prevent the banks of Salt Lake City from obtaining control over the entire banking industry of X by acquiring all of the independent banks located there and operating them as branch offices. Indeed, any Utah State bank that desires to expand into another locality can do so only by absorbing an independent bank and thereby eliminating local control of that bank. Thus, the peculiar structure of Utah's branch-banking provisions—which permit unlimited branching but decree that it shall be only by acquisition of existing banks—actually fosters absentee ownership. Banks are encouraged to grow beyond their home-office area but prevented from doing so other than by displacing an existing bank.

2. A traditional fear of opponents of branch banking is that the wealthier and more heavily capitalized urban areas of a State might come to dominate the banking markets of the rural areas and thereby impair the independence of local businessmen who are dependent upon bank credit. The branch banking provisions of Utah are not designed to prevent such a result, but, indeed, encourage it. As noted, no restriction is placed upon branching as such. Therefore, wealthy city banks are free to branch in the small towns located in the rural areas of the State. But they may not open any new facilities. They may only take over—and so eliminate as independent factors—existing banks. This system is plainly calculated to accelerate the growth of large urban banks at the expense of rural banks.

3. By the same token, the branching pattern prescribed by Utah law is inimical to the continued existence of an independent, unit banking system. Virtually no limit is placed upon the growth and expansion of powerful banks. No statutory provision precludes a single bank from coming to dominate the entire State banking industry. Certainly, none precludes growing concentration of the State's banking industry in the hands of an increasingly small number of powerful, geographically diversified banks—like the Walker Bank involved in No. 51, a Salt Lake City bank (chartered by the State) that has 14 branches throughout the State.

The take-over limitation aggravates this tendency. By precluding branching through the opening of new branch offices, it prevents a form of expansion that might be compatible with the continued existence of a substantial number of independent banks. If a bank establishes a branch by opening a new facility rather than by absorbing an existing bank, it must win a share of the banking market as a newcomer competing against the established banks in the locality, it does not merely step into the shoes of an existing competitor. This route of expansion is closed to the State banks of Utah. The only permissible mode of entry into new banking markets for them is by acquisition of existing banks, which means that every increase in branch banking in the State necessarily produces an equivalent decline in the number of independent banks in the State.

There is another respect in which Utah's take-over limitation promotes the concentration of banking assets. Suppose that a city has only one bank—a situation normally regarded as undesirable. To break its monopoly the State banking commissioner or the Comptroller of the Currency could, of course, charter a new bank in the area. But such are the practical problems involved in creating a new bank that, in many cases, the only feasible method of increasing competition in a one-bank (or other highly concentrated) banking market is to permit the establishment of a branch by an existing bank located elsewhere.[26] Utah law forbids this. In a town that has only one bank, another bank may enter only by taking over that bank—a result that leaves the condition of monopoly undisturbed.

The restriction in question here, in short, is not one designed to avert or contain the danger with which the congressional opponents of branch banking were concerned. For it is a restriction aimed not at limiting the extent of branch banking, but, if anything, at promoting its spread; a restriction rooted, not in a fear of the supposed consequences of unlimited branch banking, but in a desire to immunize existing banks—branch banks as well as the smallest independent—from the competition that is created when a new bank

[26] "* * * [S]ince branches appear to cost less to operate than small unit banks, and consequently require less capital and fewer deposits for profitable operation, branch establishment is possible in less populous or more heavily banked areas where unit bank charter would be precluded." Note, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 Yale L.J. 502, 514–515.

office is opened in a locality.[27] The tendency of Utah law is to bring about the domination of the State's banking industry by powerful branch banks effectively insulated from competitive forays by each other or by other banks. Nothing in the language, background or purpose of Section 36(c) indicates that Congress intended this kind of State policy determination to be binding on the national banks. It would be ironic to hold that, because Congress desired to give some play to strongly held feelings in many States concerning the dangers of undue concentration posed by unlimited branch banking, a provision of State law that bespeaks the State's apparent indifference to these dangers governs the national banks in the State as well.

Nor would such a result be consistent with Congress' declared purpose of establishing national banks upon a plane of competitive equality with State banks. If Utah has no policy against banks with many branches, it is not apparent why the national banks of the State should be prevented from branching because of an extraneous restriction of State law upon the method of branching. The thrust of Section 36(c) is to free national banks from restrictions upon their authority to branch, and while Congress did decide to limit that authority in States that prevent or limit the extent of branch banking within their own banking systems, it surely did not intend that in States, like

[27] See *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 237, 390 P. 2d 592, 594. Compare the provision of Utah Code Ann., 1953, § 7–3–6, not in issue here, forbidding establishment of a branch "at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof."

Utah, in which State-wide branching is encouraged, branching by national banks should be frustrated by provisions of State law.

III

AT ALL EVENTS, CONGRESS CANNOT BE PRESUMED TO HAVE IMPOSED UPON THE NATIONAL BANKS A LIMITATION OF STATE LAW, LIKE THAT AT BAR, WHICH IS OPPOSED TO A CONSISTENT FEDERAL POLICY OF PROMOTING COMPETITION IN BANKING

Quite independently of the argument set forth immediately above, we submit that in no event should the language of Section 36(c) be read so broadly as to embrace a provision of State law that is manifestly contrary to consistent federal policy in the banking area. In this part of our brief, we urge that (a) there is a well-defined federal policy favoring competition in banking and (b) that Utah's takeover provision is incompatible with that policy.

A. Since the enactment of the Sherman Act in 1890, competition has been the nation's fundamental economic policy. See (with reference to the banking industry) *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C.A. 3); 15 U.S.C. 21(a). The banking agencies—unlike the agencies that regulate transportation and communications—have no power to confer antitrust immunity. The Bank Merger Act, as recently amended, prohibits bank mergers "whose effect in any section of the country may be substantially to lessen competition" unless its adverse competitive effects are "clearly outweighed" by considerations of public need and convenience. Pub. L. 89–356, February 21, 1966, § 1, adding 12 U.S.C.

1828(c)(5), (7). "[P]romotion of healthy competition among financial institutions" was a "primary concern" in amending the Act. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 2. And the Bank Holding Company Act of 1956 was in large part intended to preserve "competition in the field of banking" and prevent undue concentration of banking power. 12 U.S.C. 1842(c); S. Rep. No. 1095, 84th Cong., 1st Sess., Part I, p. 2; 102 Cong. Rec. 6857. See, also, *First Wisconsin Bankshares Corp.* v. *Board of Governors,* 325 F. 2d 946 (C.A. 7).

B. Utah's take-over provision is inimical to this consistent federal policy favoring competition in banking in two respects. First, it encourages bank mergers—that being the only method by which a State bank of Utah may branch—even between competing banks located in the same town or village. Not all such mergers are substantially anti-competitive, but this Court has pointed out the serious competitive dangers that some create (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 369–370):

> * * * Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. * * * If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-à-vis* larger businesses with which he competes. In this fashion, concentration in banking accelerates concentration generally.

Secondly, Utah's take-over restriction is anti-competitive in that it precludes new entry into highly concentrated banking markets through internal expansion. Viewed from the standpoint of the federal policy of fostering competition, the opening of new bank offices is often preferable to the acquisition of existing banks as a method of growth. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370. Entry by internal growth increases the number of banks in the market, while entry by merger—which merely substitutes the new entrant for an existing competitor—leaves concentration in the market unchanged. Cf. *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174.

It is no answer that limiting branching to the acquisition of existing banks encourages the formation of new banks and so indirectly retards concentration (Br. in Opp., No. 88, p. 15). Entry into a market by forming a new bank is substantially more difficult, and usually less feasible, than the establishment of a branch by an existing institution (see n. 26, *supra,* p. 37). Formation of a new bank requires the raising of substantial sums of new capital from individual subscribers, the recruitment of new management, and a period of investigation into the character and competence of the new management by the appropriate banking authority. Moreover, its successful operation will probably depend upon a protracted effort to secure the confidence of customers. In banking, even more than in other industries, creation of new independent units of competition is a costly, difficult, uncertain, and time-consuming process. By contrast, a branch bank may frequently be established with the

parent bank's existing capital and managerial personnel, and securing customers in a new area is facilitated by the bank's name and reputation in the communities it already serves.

In any event, there is no indication that the Utah statute in fact encourages the formation of new unit banks. It seems more likely to do the opposite. Since the large city banks are free to establish branches in cities and towns throughout the State, a newly formed bank may have to meet, from the outset, competition from the largest, most powerful banks in the State—banks whose loan limits, capital resources, and diversity of investments no new bank could hope to match. If, for example, the Utah statute were applicable to national banks, there would be little incentive for the formation of a new bank in Logan, since any new bank would have to meet the competition of Walker Bank & Trust Co.—the second largest bank in the State.

If, as we urge, Utah's requirement that a branch may be established only by taking over an existing bank is limited to State banks, the national banks of Utah will remain an important source of new competition in concentrated banking markets in the State. If, however, the restriction is applicable to national banks as well, the adverse competitive effects of the State's restrictive policy will be greatly aggravated, and the Comptroller placed in the untenable position, in passing upon requests for approval to branch, of having to choose between permitting a merger—which in many cases will increase concentration, and rarely lessen it—and forbidding the establishment of a branch

altogether—which may deny the market involved a needed competitive infusion.

We think it unsound to presume, in the absence of express statutory language, that Congress intended a restriction so contrary to long-established federal policy to bind the Comptroller and the national banks. Such a result, as noted previously, has no support in either the text or the history of the branch banking provisions of the National Bank Act. Congress intended deference only to certain State laws that sought to check concentration which opponents feared might result from branch banking—not, as in the case of Utah, laws designed to achieve an antithetical result.[28]

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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[28] The anti-competitive character of Utah's branching laws is suggested by the fact that Utah has far fewer banks per capita than the national average. See App. C, *infra*, p. 53.

APPENDIX A

United States Code, Title 12, Sec. 36(c) provides:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in

which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

Utah Code Annoated, 1953, Sec. 7–3–6, as amended, provides:

7–3–6. Business conducted at banking house—Branching of offices—Violation of section a misdemeanor.—The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $600,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or

national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

The term "branch" as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may resonably require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the county in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, state the reasons therefor, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the establishment of such branch or office designate and limit the character of work and service which may therein be performed.

No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.

Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

APPENDIX B

Summary of the Branch Banking Statutes of the Fifty States

(1) States permitting branching without restriction as to location or method:

Alaska—Alaska Stats. 1962, Title 6, § 06.05.-415.

Arizona—Ariz. Rev. Stat. Anno., Title 6, § 6–223.

California—Calif. Financial Code, §§ 502, 503, 361.

Delaware—Dela. Code Anno., Title 5, § 770.

Hawaii—Hawaii Session Laws 1956, Vol. I, Act 201, § 43, amending § 178–39, Revised Laws of Hawaii.

Idaho—Idaho Code, § 26–1001 (1965 Supp.).

Maryland—Anno. Code of Md., Art. 11 § 65.

Nevada—Nevada Rev. Stat., § 660.010.

North Carolina—Gen. Stats. of N.C., § 53–62 (1965).

Rhode Island—Gen. Laws of Rhode Island, § 19–1–13.

South Carolina—Code of Laws of S.C., § 8–57.

Vermont—Vermont Stats. Anno., Title 8, §§ 501 *et seq.*

(2) States which permit branching but impose geographical restrictions:

Alabama—Code of Ala. (1958), Title 5, §§ 125, 125(1); Appendix, §§ 192, 193, 429, 555, 986; Acts of Alabama, 1965 and 1964 1st and 2d Special Sessions, Acts 22, 24, 40, 60, 70, 91, 152, 184; Acts of Ala. Regular Session 1965, Act 510; and Acts of Ala., Regular Session of

1964, Acts 332, 521, and 884 (although Code generally prohibits branches except at principal place of business, special acts permit county-wide branching in most instances and home-city branching in others).

Georgia—Code of Ga. Anno., § 13–203 (home municipality branching only; but in towns of 80,000 people or less, only one bank office or facility for each 40,000 persons).

Indiana—5 Burns Ind. Stats. Anno., (1964 replacement), § 18–1707 (home municipality branching for counties with less than 500,000, except that a bank may establish branch in any city or town within county if there is no bank there; for counties of more than 500,000 people, branching in any city or town in the county; no branch within ¼ mile of another bank nor at any location which will jeopardize the welfare of another bank.)

Kentucky—Ky. Rev. Stat., § 287.180, as amended by Chap. 252, Ky. Acts 1962 (home-county branching, except that branching permitted in adjacent county in which there is no existing bank or branch; in addition, except by merger, no branch may be established in any incorporated city, except the home city in which there is an existing bank, and no branch in any unincorporated area within a radius of one mile of an existing bank).

Louisiana—Louisiana Rev. Stats. Anno., §§ 6–54, 6–55 (branches in the parish of domicile only, except in four specified parishes, or in parishes which have no banks).

Maine—Rev. Stats. of Maine Anno., 1964, Title 9, §§ 442, 443 (home county or adjacent counties; but branch may be established in any municipality by taking over a unit bank or where there is no bank).

Massachusetts—Anno. Laws of Mass., Chap. 172A, § 12, and (1965 Cum. Supp.) Chap. 172, § 11 (home county branching).

Michigan—Mich. Stats. Anno., § 23.762, and 1965 Cum. Supp.), § 23.762(1) (branching with-

in home county, or within 25 miles of principal office; but no branch may be established in a city or village outside the home municipality, if a bank or branch is already located there).

Mississippi—Miss. Code Anno., §§ 5228, 5229, 5230, 5231 (home county or adjacent county; but branches must be within a radius of 100 miles of the parent bank and no bank can establish more than 15 branches).

New Hampshire—N.H. Rev. Stat. Anno., § 384B; 2 (1965 Supp.) (branches within home municipality; branch may be established in any town by consolidation or merger or unless no bank or branch in contiguous town).

New Jersey—N.J. Stats. Anno., § 17: 9A–19 (home municipality; by merger, home county).

New Mexico—N.M. Stats. Anno., § 48–2–17 (home county, except where adjacent county has no bank).

New York—McKinney's Consolidated Laws of N.Y. Anno., Title 4, §§ 105, 600, 601a (any city or village in the same banking district, with exceptions).

Ohio—Page's Ohio Rev. Code Anno., Title 11, § 1103.09 (home county).

Pennsylvania—Purdon's Pa. Stats. Anno., Title 7 (Banking Code of 1965) § 904 (home county, plus contiguous counties).

South Dakota—S.D. Code of 1939, § 6.0402 (no branch in any city or town after a bank has received authority to operate there, with exceptions for branching by consolidation or purchase).

Tennessee—Tenn. Code Anno., § 45–211 (home county).

(3) States which permit branching, but which require and/or encourage that it be accomplished by acquisition or merger rather than by the establishment of new facilities:

Connecticut—General Stats. of Conn. (1958), Title 36, § 36–59 (State-wide branching by

merger permitted, but establishment of branches by new facility limited to home town or to towns where there are no banks).

Kentucky—Ky. Rev. Stat., § 287.180, as amended by Chap. 252, Ky. Acts 1962 (county-wide branching permitted by merger; but, except by merger, no bank may establish a branch outside its home city, unless there is no bank there).

Maine—Rev. Stats. of Maine Anno., 1964, Title 9, §§ 442, 443 (branches may be established in any municipality in the state by taking over a unit bank or where there is no bank; otherwise, only in home county or adjoining counties).

Massachusetts—Anno. Laws of Mass., Chap. 172A, § 12, and (1965 Cum. Supp.), Chap. 172, § 11 (if branching by merger, no need to show that present banking facilities are inadequate for the public convenience).

Mississippi—Miss. Code Anno., §§ 5228, 5229, 5230, 5231 (branch may be established by acquisition where within 100 miles of parent branch; otherwise restricted to home county and adjacent counties).

New Hampshire—N.H. Rev. Stat. Anno., § 384B; 2 (1965 Supp.) (branch may be established by acquisition within 30 miles of main office; but otherwise restricted to home town or to places where there are no banks).

New Jersey—N.J. Stats. Anno., § 17:9A–19 (home municipality; by merger, home county).

New York—McKinney's Consolidated Laws of N.Y. Anno., Title 4, §§ 105, 600, 601 (branching by merger permitted in some instances where otherwise prohibited).

Oregon—Ore. Rev. Stat., § 714.050 (in municipality of less than 50,000 where there is an existing bank, branching permitted only by taking over an existing bank).

Pennsylvania—Purdon's Pa. Stats. Anno., Title 7 (Banking Code of 1965), § 904 (if branching by merger, no need to show needs and convenience).

South Dakota—S.D. Code of 1939, § 6.0402 (no branch in any city or town after a bank has received authority to operate there, with exceptions for branching by consolidation or purchase).

Utah—Utah Code Anno. (1953), § 7–3–6 (as set forth, *supra,* pp. 45–46).

Virginia—Code of Va., Title 6, § 26, and § 6–27 (State-wide branching by merger; otherwise branching is limited to home city or to cities and counties contiguous to the city or county in which the parent bank is located).

Washington—Rev. Code of Wash. Anno., § 30.40.020 (State-wide branching by merger permitted; otherwise branching restricted to the home county, or to those that have no bank or branch).

(4) States that prohibit branches as such but authorize branching facilities:

Arkansas—Ark. Stats. 1947, 1966 replacement, §§ 67–205, 67–340, 67–341, 67–342, 67–345, 67–348 (branching permitted in a town of not more than 4,000 or less than 3,900 people; authorized banks may establish teller's windows in their home cities, no closer than 3,000 feet to the main office of any other bank; except that any bank chartered for 60 years or more may establish a teller's window in any town or city of the second class within the home county if there is no other legally chartered bank or window there).

Florida—Fla. Stats. Anno., § 659.06 (drive-in or walk-up facility permitted if it is located on the property of the main bank or on property contiguous thereto).

Iowa—Iowa Code Anno. (1965 Cum. Supp.), § 528.51 (office for receiving deposits and paying checks permitted in place contiguous to the county in which the bank is located; but not in cities or towns where there is already established a banking institution; parking lot offices with drive-in windows for receiving and paying of checks also permitted).

Kansas—Kan. Stats. Anno., § 9–1111 (one detached or attached auxiliary teller office or drive-in facility within 2,600 feet of premises).

Missouri—Vernon's Anno. Mo. Stats. (1965 Cum. Supp.), § 362.107 (one drive-in or walk-up facility per bank within 1,000 yards of the bank permitted).

Montana—Rev. Codes of Mont. Anno. (1965 Cum. Supp.), § 5–1028 (one detached drive-in or walk-up facility within 1,000 feet of bank).

Nebraska—Rev. Stats. of Neb. (1965 Cum. Supp.) § 8–157 (one auxiliary teller drive-in or walk-up facility within 2,600 feet of main bank).

North Dakota—N.D. Century Code (1965 Supp.), § 6–03–14 (receiving and paying stations within home county or adjoining county, or in city, town or village not having a bank).

Oklahoma—Okla. Stats. Anno. (1965 Supp., Title 6, § 2061 (one outside facility for drive-in or walk-up service within 1,000 feet of bank).

(5) States which do not permit branch banks or other branching facilities, but permit branching for saving and loan associations:

Colorado—Rev. Stat. 1963, § 122–2–20.

Wisconsin—West's Wisc. Stats. Anno., §§ 221.04(e), 215.13(39) (statute permits branch in any town completely surrounded by water and having no bank; branching otherwise limited to savings and loan association).

(6) States which do not permit branch banking or other branching facilities:

Illinois—Smith-Hurd Illinois Anno. Stats., Chap. 16½, § 106.

Minnesota—Minnesota Stats. Anno., § 48–34.

Texas—Vernon's Civ. Stats. of Tex., Anno., Art. 342–903.

West Virginia—W. Va. Code of 1961 Anno., § 3131.

Wyoming—Wyoming has no legislation authorizing branch banking.

APPENDIX C

Banks per community in Utah and the United States

(1)	(2)	(3)	(4) ((3)/(2))	(5)	(6)	(7) ((6)/(5))
Community population[1]	Utah			United States		
	Number of communities	Number of banks	Banks per community	Number of communities	Number of banks	Banks per community
Less than 10,000	206	35	0.2	14,572	9,966	0.7
10,000–25,000	6	6	1.0	539	1,222	2.3
25,000–50,000	1	2	2.0	173	523	3.0
50,000–100,000	1	5	5.0	22	132	6.0
Over 100,000	1	9	9.0	184	3,317	18.0
Total	215	57	.3	15,490	15,160	1.0

[1] The United States data for categories less than 10,000, 10,000–25,000, and 25,000–50,000 apply to nonmetropolitan area communities for 1960. The remaining two categories apply to Standard Metropolitan Statistical Area (Census Bureau definition) data for 1962. The Utah bank data are for 1966; population data, for 1960.

Sources: Bernard Shull and Paul M. Horvitz, "Branch Banking and the Structure of Competition," *The National Banking Review* (March 1964), table 16, p. 324, and table 21, p. 329; *Operating Banking Offices Insured by the Federal Deposit Insurance Corporation* as of June 1, 1966 (Washington, D.C., Office of the Secretary of the Federal Deposit Insurance Corporation, 1966); and 1960 Census of Population, vol. 1, part 46.

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No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, *Petitioner*

v.

WALKER BANK & TRUST COMPANY, A CORPORATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF

JAMES A. FOOTE
[illegible]

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THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, *Petitioner*

v.

WALKER BANK & TRUST COMPANY, A CORPORATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF

STATUTES INVOLVED

In addition to the statutes cited by the Petitioners, Utah Code Annot. Section 7-3-6.3 (Supp. 1965) is involved:

> From and after the effective date of this act no unit bank and no branch bank shall be established or authorized to conduct a banking business except as hereinbefore in section 7-3-6 expressly provided.

The effective date was March 13, 1953.[1]

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[1] Laws of Utah, ch. 8, § 5 (1953).

QUESTION PRESENTED

The question presented is whether Section 36(c) (1) of the National Bank Act [2] authorizes the establishent by a national banking association of a branch bank in the city in which it is situated when under applicable state law a state bank would be prohibited from establishing the branch.

STATEMENT OF THE CASE

This case was submitted to the United States District Court for the District of Utah for its decision on the merits upon the facts stipulated by the parties [3] which, briefly summarized, are as follows:

On or about November 9, 1962, the Petitioner, The First National Bank of Logan ("Petitioner Bank"), applied to James J. Saxon, Comptroller of the Currency ("Comptroller") for authority to establish a branch bank in the city of Logan, Utah, which is a city of the second class as cities are classified by the statutes of the State of Utah.

On January 21, 1963 the Comptroller issued his certificate approving and authorizing the Petitioner Bank to establish and operate a branch in Logan, Utah and on that date the Petitioner Bank commenced regularly to transact a customary banking business at the branch so authorized. In establishing the branch, the Petitioner Bank did not take over an existing bank. The Petitioner Bank will continue to operate the branch bank, unless enjoined by the court from so doing.

Prior to the Comptroller's authorization for the establishment of the branch bank, the Petitioner Bank regularly transacted a customary banking business at its banking

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[2] Glass-Steagall Act § 23, 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964).

[3] R 11, 15, 16.

house located at 99 North Main Street, Logan, Utah. At and prior to the time of the issuance of the Comptroller's certificate of authority, the Walker Bank & Trust Company ("Respondent"), was regularly transacting a customary banking business at its branch bank located in the city of Logan, which it had acquired as the resulting bank of a statutory merger on December 8, 1956 whereby Cache Valley Banking Company, a state bank theretofore operating as a unit bank in Logan, was merged with Respondent Bank. At the time of the commencement of this action Respondent had demand and time deposits at that branch in excess of $10,000,000, outstanding loans in excess of $5,000,000 and investments in furniture, fixtures and leasehold improvements in excess of $50,000. First Security Bank of Utah, N.A., a party to the case consolidated herewith, also had a branch in Logan.

This action was commenced July 9, 1963 to obtain a declaratory judgment that the Comptroller is prohibited by Section 36(c) (1) of the National Bank Act from authorizing the Petitioner Bank to establish and operate its branch in Logan and for injunctive relief against the operation thereof by the Petitioner Bank.

In a memorandum decision entered on September 30, 1964 [4] the District Court entered judgment dismissing the complaint. Although the court noted that under Utah law a state bank was prohibited from opening a branch in its home city if it was the only bank having its main office there, it concluded that since Utah law did permit operation of branches under some circumstances not then applicable to the city of Logan [5] "new branches" were "ex-

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[4] R 37-45, 234 F. Supp. 74 (D. Utah 1964).

[5] The court relied upon *Walker Bank & Trust Co. v. Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964). UTAH CODE ANNOT. §§ 7-3-6, -6.3 (Supp. 1965) contain a general prohibition of branch banks but permit branches (1) in cities of the first class and unincorporated parts of their counties

pressly authorized" by Utah law within the meaning of Section 36(c) (1) and the Comptroller had power to authorize the Petitioner Bank's branch.[6]

The Tenth Circuit reversed,[7] holding:

> [T]he purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said . . . that state law will *in each instance* determine whether to permit a national bank to branch. . . . It seems to us a frustration of that policy to say as the trial court did that merely because a state in a broad general way sanctions branch banking, that is enough to permit a national branch, even though other vital provisions of state branching laws are not met. . . . [W]e believe the proper approach is . . . to look at all the state law on branch banking not just part of it.[8]

ARGUMENT

Introduction and Summary

Congress has authorized the Comptroller to approve the establishment and operation of a new branch by a national bank "within the limits of the city . . . in which said association is situated, if *such establishment and operation are at the time expressly authorized* to State banks by the law of the State in question. . . ."[9] We urge that the federal statute means that a new branch of a national bank is permitted only if state law would in *that instance*

(Salt Lake City and County), (2) in other incorporated areas where there is no existing unit bank, and (3) in other incorporated areas where there is an existing unit bank by a "take-over" of an existing bank.

[6] R 41, 234 F. Supp. at 77.

[7] R 48-56, 352 F.2d 90 (10th Cir. 1965).

[8] R 55-56, 352 F.2d at 94. (Emphasis added.)

[9] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964). (Emphasis added.)

sanction the establishment and operation of *that* branch for a state bank similarly situated. The law of Utah prohibits the authorization and establishment of a new branch bank in Logan by a state bank; therefore, the action of the Comptroller and Petitioner Bank in establishing a new branch facility is contrary to law.

The overriding policy which Congress accepted in the original passage of Section 36(c) (1) was that if two systems of banking, state and federal, are to long coexist, there must be competitive equality between the two systems. Prior to 1927 some states permitted the establishment of branch banks, and it was the competitive advantage thus achieved by some state banks which resulted in federal legislation permitting national banks to branch. In passing Section 36(c) (1) in substantially its present form Congress' primary objective was to effect equality between the two systems with respect to establishing branch banks. The arguments of opponents and proponents of branch banking were considered, the opponents taking the position that liberal branching would lead to undue concentrations of banking power and to local dependence upon "out-of-town" bankers. Presumably in deference to the arguments of the opponents, Congress concluded it should permit states to determine the policy of local branch banking, and in so doing the main objective of competitive equality for the national system was to be protected. Congress did not go beyond saying that the two banking systems insofar as branches are concerned should "compete on equal terms . . . where the States make the competition possible,"[10] and Congress cast aside any decision in favor of or against branch banking. In this light the Comptroller's attempt to instigate a liberal branching rule for national banks

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[10] 77 CONG. REC. 5896 (1933) (remarks of Representative Luce reporting the bill from conference).

based upon such pro and con arguments, if applied, would severely frustrate the efforts of Congress to establish competitive equality between the two systems by causing a recurrence of the prior evil through favoring national banks over state banks.

It has been conceded that under the circumstances of this case applicable state law prohibits the establishment of a "new branch" by a state bank. We contend that as a result of such prohibition the "establishment" of the Petitioner Bank's branch is not "expressly authorized," and that upon this basis alone, without any resort to rules of statutory construction or to an analysis of the extent to which state law has been adopted, the case should be decided in favor of the Respondent. However, the decision of the trial court in this case rests on a unique position taken by the Comptroller in the interpretation of Section 36(c) (1) involving the extent to which that section adopts state law as the governing authority for establishing new branches by national banks. As will hereinafter appear, the term "unique" is used advisedly.

I

THE ESTABLISHMENT AND OPERATION OF THE PETITIONER BANK'S NEW BRANCH VIOLATES SECTION 36 (c) (1), BECAUSE SUCH ESTABLISHMENT IS NOT "EXPRESSLY AUTHORIZED" BY STATE LAW.

There is no difficult complexity or ambiguity in Section 36(c) (1).[11] It authorizes a national bank to establish a "new" branch within the city in which its main office is located (an "inside" branch), if (1) "such establishment" is "at the time expressly authorized to State banks by the law of the State in question," and (2) the Comptroller's approval is given. It is clear that the pertinent "law of the

[11] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964).

State" is the law of the State "at the time" of the particular establishment and that determination of whether a new branch is "expressly authorized" must be made in *each instance* of an establishment and in respect to *the* particular establishment, i.e., with respect to "such establishment." The meaning of the term "new" branch seems equally clear since in subsection (b) of Section 36[12] Congress has dealt with take-overs of existing branches, and it must therefore be concerned in Section 36(c) with de novo establishments, i.e., branches not derived by merger, consolidation or otherwise from a previously existing banking house.

(A) The "Law of the State" Does Not Authorize the Petitioner Bank's New Branch Nor Does It Authorize Any New or De Novo Branches.

The Utah statute on branch banking provides that "no branch bank shall be established or authorized to conduct a banking business except as hereinbefore . . . expressly provided."[13] The only exception from this general prohibition of branch banks by the State of Utah which could apply to the circumstances of the Petitioner Bank's branch states that "except in cities of the first class . . ., no branch bank shall be established in any city or town in which is located a *bank or banks,* state or national, regularly transacting a customary banking business, *unless the bank seeking to establish such branch shall take over an existing bank.*"[14] It is conceded that if the Petitioner Bank were a

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[12] 76 Stat. 667, (1962), 12 U.S.C. § 36(b)(2) (1964).

[13] UTAH CODE ANNOT § 7-3-6.3 (Supp. 1965). The same substance is contained in the opening sentence of UTAH CODE ANNOT. § 7-3-6 (Supp. 1965).

[14] UTAH CODE ANNOT. § 7-3-6 (4th para.) (Supp. 1965). (Emphasis added.) In unabridged form § 7-3-6 (4th para.) provides:

Except in cities of the first class or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks,

state bank, the law of Utah would preclude it from establishing and operating its new branch.[15] The city of Logan, in which the Petitioner Bank is located, is not a city of the first class,[16] and the Petitioner Bank in seeking to establish such branch and in establishing the same did not take over an existing bank.[17] Thus, under the Utah law applicable to this case branches are prohibited subject only to a limited exception relating to a "take-over" of an existing bank, and new or de novo branches[18] are totally prohibited.

Prior to the argument and final hearing in the lower court in this case, the Supreme Court of the State of Utah decided *Walker Bank & Trust Co. v. Taylor*[19] which holds that, except in a city of the first class, Sections 7-3-6 and -6.3 of the Utah Code, *supra*, expressly prohibit the establishment of a new branch in any city or town in Utah where a unit bank is located. The facts in that case are identical with those in the instant case, except that the defendants in the *Taylor* case were the Bank Commissioner of the State of Utah and a state bank located in Provo, Utah, also a city of the second class. Thus, the meaning

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state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

[15] R 38-39, 234 F. Supp. at 76-77.

[16] R 12.

[17] R 13.

[18] The term "new branch" or "de novo branch" as used in connection with Petitioner Bank's branch refers to an additional banking house established by a bank and not theretofore in existence, as distinguished from a banking house of a constituent banking corporation of a merger or consolidation which is retained and operated as a branch by the resulting bank.

[19] 15 Utah 2d 234, 390 P.2d 592 (1964).

and effect of the applicable Utah Statute is conclusively established. [20]

In reaching its decision in the *Taylor* case, the Supreme Court of the State of Utah states:

> We are of the opinion that our statute is restrictive and, what it does not expressly permit, it prohibits. There is but one method of establishing a branch bank in a city of less than the first class having an existing unit bank and that is by "taking over" such bank. The legislative history of branch banking is of great significance. In 1911, the legislature enacted a statute which absolutely prohibited branch banking. It was not until 1933 that the legislature relaxed this prohibition and permitted branching under certain conditions and circumstances. During the period between 1911 and 1933 the legislature evidently was of the opinion that branch banking was not in the public interest, possibly because it might impair the stability of the existing banks. This reasoning could well have influenced the law makers when they saw fit to allow branch banking, but only under certain restrictive conditions. This legislative history lends support to the proposition that what our branch banking laws do not permit they prohibit. [21]

The establishment and operation of the Petitioner Bank's new branch is conditioned, by the clear and unambiguous language of Section 36(c) (1), upon such establishment and operation being "at the time expressly authorized to state banks by the law of the state in question." The *Taylor* decision conclusively establishes that the law of Utah does not "expressly authorize," but expressly prohibits, the operation of such a branch to state banks; therefore, the establishment and operation of the Petitioner Bank's branch violates the federal statute.

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[20] *First Nat'l Bank v. Missouri*, 236 U.S. 640, 656 (1924).
[21] 15 Utah 2d 234, 236-37, 390 P.2d 592, 594 (1964).

(B) Petitioner Bank's New Branch is Not Expressly Authorized by the Law of the State Within the Meaning of Section 36(c)(1).

The meaning of the term "expressly authorized" is in controversy in this case. We contend that since the law of Utah would prohibit a state bank from opening a branch similar to the Petitioner Bank's new branch, there is no express authorization in state law within the meaning of Section 36(c) (1). The Petitioners on the other hand, while conceding that a branch would not be "expressly authorized" if Utah prohibited all branch banks, rely on the premise "that § 36(c) (1) embodies only the requirement that inside branching be 'expressly authorized' to state banks by state law without other conditions or restrictions of state law. . . ." [22] Thus, they argue that "even though a state bank in an identical situation with that presented here could not establish a branch bank, nevertheless a national bank could because state law generally sanctions branch banking." [23] We support our contention, first, on the premise that there is no express authorization because Utah law prohibits all "new branches" in cities such as Logan and, second, that even if Utah law is presumed to authorize some branches it would not authorize a new branch *in this instance,* and we contend that Section 36(c) (1) requires application of state law to the particular facts of each new branch of a national bank.

1. Section 36(c) (1) permits establishment of "new branches" if such establishment is expressly authorized by state law. Both the Utah statutes and Section 36 clearly distinguish and treat separately new branches and branches acquired by a merger or consolidation. Since in Section 36(c) (1) Congress was dealing, not with "take-over" branches, but with "new" or de novo ones, it is clear that

[22] R 51, 352 F.2d at 92.
[23] *Ibid.*

the inquiry into whether the state expressly authorizes new branches should be limited to whether new branches, as distinguished from take-over branches, are authorized by state law.

The take-over proviso of Section 7-3-6 of the Utah Code [24] recognizes this distinction and as a safeguard against the use of the merger route as a subterfuge for acquiring a new branch provides:

> No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

Section 36(c) of the federal statute pertains exclusively to "new branches."[25] The acquisition by national banks of branches by a merger or consolidation is dealt with separately in subsection (b) (2) of Section 36, which provides as follows:

> (2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office, which, immediately prior to such consolidation, was in operation as —
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> > (A) a main office or branch office of any bank, (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comp-

[24] UTAH CODE ANNOT. § 7-3-6 (4th para.) (Supp. 1965).
[25] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c) (1964).

troller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such state from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation. [26]

The merger proviso of the Utah statute cannot be converted to the requisite "express authority" under state law for the establishment of "new branches" by national banks under subsection (c) of Section 36. In fact, subsection (b) (2) of Section 36, which also incorporates state law as the standard for a national bank's acquisition of a branch by a merger or consolidation, makes it clear that Congress did not intend to adopt state law relating to the acquisition of branches through a merger or consolidation as "express authority" for the establishment of "new branches" under subsection (c). [27] In addition, Section 36(c) (1) itself shows it was meant to be limited in scope to new branches. It provides that "new branches" may be

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[26] 76 Stat. 667 (1962), 12 U.S.C. § 36(b)(2) (1964).

[27] See S. Rep. No. 2040, 87th Cong., 2d Sess. (1962).

established if "such establishment" is expressly authorized by state law.

2. State statutory authority for branching, as applied to national banks, cannot be fragmented so as to sever the limitations contained therein with respect to branch banking by state banks. A contrary contention was rejected by the Tenth Circuit in its opinion in this case where the court stressed that "State law will in *each instance* determine whether to permit a national bank to branch."[28] The court's reference to "each instance" has merit, because it stresses the natural emphasis of the word "such" as it is used in Section 36(c) (1). Congress would not have said "if *such* establishment and operation are at the time expressly authorized," if it had intended to say "if *any* establishment is expressly authorized" as the trial court in this case has assumed.[29]

Other federal courts are in harmony with the Tenth Circuit.[30] For example, the Fifth Circuit in a case involv-

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[28] R 55, 352 F.2d at 94. (Emphasis added.)

[29] In R 41 n.8, 234 F. Supp. at 78 n.8 the court states:

That there are conditions for such establishment, including . . . the acquisition of another bank, does not change the "express authority" into a lack of authority on the part of State banks or a lack of a statutory expression of such authority, and does not add to the Federal statute a requirement that compliance be made by National banks with all State conditions.

[30] *Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965) (effect given to state law "pursuant to a strong and distinct 'policy of equalization' for our dual banking system"); *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958) ("[T]he Michigan statute . . . is here controlling. . . ."); *Security Bank v. Saxon*, Civil No. J-65-C-46, E.D. Ark., June 22, 1966 (relying on the 10th Cir. at 6); *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401 (E.D. Mich. 1965); *Commercial Security Bank v. Saxon*, 236 F. Supp. 457 (D.D.C. 1964) (affirmed by the D.C. Cir. and consolidated with the instant case in this court) ("[E]xact standards of the Utah branching law must be applied. . . ."); *South Dakota v. National Bank*, 219 F. Supp. 842 (S.D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *Suburban Trust Co. v. National Bank*, 211 F. Supp.

ing an inside branch has said that a national bank is precluded from opening a branch, "unless a *similary situated* state bank would be authorized under state law to open a similar office," [31] and the case upon which Petitioners rely for support is not inconsistent with that interpretation. [32]

It is equally clear from the legislative history [33] of Section 36(c) that the law of the state is to be applied in "each instance." Senator Glass, Chairman of the Senate Committee on Banking and Currency and sponsor of the 1933 Act, in reporting the provision on the floor of the Senate said it "required that the establishment of branch banks by national banks in States which by law permit branch banking should be *under the regulations required by State*

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694 (D.N.J. 1962); *Commercial State Bank v. Gidney*, 174 F. Supp. 770, 775 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960) (It was "the apparent purpose of Congress to have *exactly* the same standards . . . apply to . . . national bank branches as apply to the establishment of state bank branches.").

[31] *Jackson v. First Nat'l Bank*, 349 F.2d 71, 72-73 (5th Cir. 1965). The court also said: "Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system." *Id.* at 74.

[32] In *First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965), the issue was whether in approving an "outside" branch pursuant to 12 U.S.C. § 36(c)(2) the Comptroller must comply with the inquiries and ascertainments required of the state banking authority in the exercise of its discretion. It was held that the discretion of the Comptroller is unfettered by such state guidelines to executive decision, a position with which we agree since section 36(c) provides that a branch may be established only "with the approval of the Comptroller of the Currency." *Id.* at 272. The issue contained in the instant case was not there presented, but the court noted in harmony with the other cases of lower federal courts that the Comptroller's action should be measured by the criteria enumerated in 12 U.S.C. § 36(c), namely, "whether the establishment of the branch is 'authorized to State Banks' *and* the location conforms to the restriction of State laws." *Ibid.* (Emphasis added.)

[33] The legislative history has not been set forth in this brief in detail because of the exhaustive treatment of it in the Brief for Respondent, Commercial Security Bank, Nos. 73 and 88.

Law of State banks." [34] On another occasion Senator Glass stressed this very point in countering a motion to strike the provision:

> Mr. Glass. . . . Section 19 as we now have it provides an exceedingly limited degree of branch banking *in only those States the law of which permit branch banking, and only to the extent that the State laws permit branch banking,* and I think it would be most unfortunate to strike that section out.
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> Mr. Copeland. Mr. President, I think I understand the Senator, and that is my own thought about it, that as we have amended the bill it permits branch banking only in those States where the State laws permit branch banking by State banks.
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> Mr. Glass. *Only in those States and to the extent that the State laws permit branch banking.* [35]

Again Senator Glass stated his position with regard to the meaning of Section 36(c) (1) when he said: "What we mean is that national banks may have branches in those States which permit the same privilege to State banks." [36]

Remarks of other members of Congress, not as intimately concerned with the bill as Senator Glass, also show they understood the same connotation. Senator Vandenberg said the section provides "that the branch banking privilege so far as national banks are concerned shall follow the status established by State law in respect to the State privilege." [37] Representative Bacon also commented that branches may be established provided "this is permitted by laws of that State *and subject to them."* [38]

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[34] 77 CONG. REC. 3726 (1933). (Emphasis added.) Senator Glass had originally favored allowing national branches regardless of state law but had eventually acceded to the measure in its present form.

[35] 76 CONG. REC. 2511 (1933). (Emphasis added.)

[36] 76 CONG. REC. 1997 (1933).

[37] 76 CONG. REC. 2262 (1933).

[38] 77 CONG. REC. 3949 (1933). (Emphasis added.)

(C) The Overriding Policy to be Served in Section 36 (c) (1) is the Competitive Equality of State and National Banking Systems.

At the time Section 36(c) (1) was enacted[39] no unanimity had been reached by Congress on whether or to what extent branch banking had merit and should be allowed. The act in its final form was a partial concession to the opponents of branching by Senator Glass, who had favored liberal branching by national banks, and it appears from the legislative history that agreement was reached only upon the understanding that competitive equality between state and national banking systems was to be effected.[40] As a result, a national policy on the merit and desirable extent of branch banking was not established, and Congress was content to defer to the policies of the individual states.

This intent of Congress was reiterated by Representative Luce, a member of the Conference Committee on the Glass-Steagall Act, when he was reporting on the results of the Conference. He said:

> He [Mr. Goldsborough] has withdrawn the obstacle in the way by consenting to branch banking in States that explicitly permit it for banks chartered under

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[39] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964).

[40] In reporting S. 1631 on the floor of the Senate, Senator Glass said:

> It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those States which by law permit branch banking to State banks. It went even further under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be *under the regulations required by State law of State banks.*
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> How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; *and*

> their own laws, such States being now a dozen or so in number. In the controversy over the respective merits of what are known as "unit banking" and "branch banking systems," a controversy that has been alive and sharp for years, branch banking has been steadily gaining favor. It is not, however, here proposed to give the advocates of branch banking any advantage. *We do not go an inch beyond saying that the two ideas shall compete on equal terms* and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail. [41]

Also Senator Glass in settling on that position said, "We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand." [42]

Thus, both the lower federal courts which have been cited[43] and the legislative history of Section 36(c) support our contention that Congress intended to insure competitive equality in branching by national and state banks. Congress, of course, could have regulated branching by national banks in total disregard of the limitations thereon applicable to state banks under the various state laws. The legislative history of Section 36(c) demonstrates, however, that Congress chose to provide for competitive equality in

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why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate. 77 CONG. REC. 3726 (1933). (Emphasis added.)

[41] 77 CONG. REC. 5896 (1933). (Emphasis added.)

[42] 77 CONG. REC. 3726 (1933) (remarks of Senator Glass, Committee Chairman and sponsor of the bill). See 76 CONG. REC. 1996-97 (1933) (exchange between Senator Glass and Senator Wheeler).

[43] Cases cited note 30, *supra.*

this important area of banking by adopting the state law applicable to branching by state banks as the controlling authority for branching by national banks. In so doing, Congress has clearly manifested its intention with respect to both inside branching by national banks (subdivision (1) of Section 36(c)) and outside branching (subdivision (2) of subsection (c)) "that a national bank should have no greater rights than it would if it were a state bank." [44]

In considering the legislative history of Section 36(c), it is important to recognize the gross competitive imbalance in branching by national and state banks in Utah that would result if the Petitioners' position were sustained. If the take-over proviso of the Utah statute were to constitute the requisite authority for the establishment and operation of new branches by national banks, the door would be open for new inside branching by national banks in every city and town in the State of Utah,[45] and the result would be a reappearance of the evil the 1927 and 1933 legislation was intended to correct, except that on this occasion the national banks, instead of state banks, would have the advantage of the more liberal branching rules and, hence, the competitive advantage Congress has sought to avoid.[46]

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[44] *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958). In *Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965) it was said:

Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct policy of equalization for our dual banking system.

[45] It must be conceded that, if the trial court's construction in this case were followed, it would be equally applicable to cases of outside branches under Section 36(c)(2). See R 40-41, 43-44, 234 F. Supp. at 77, 70, where it was held that Utah's take-over exception to a general prohibition of branches was express authorization of "new branches" in contemplation of Section 36(c)(1).

[46] *Cf. Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965), which on its facts suggests that a similar unequal result would be reached in Georgia on the Comptroller's theory.

In contrast to state-wide branching authorized to national banks that would have resulted under the lower court's decision in this case, the law of Utah prohibits state banks from establishing new branches in any city or town in Utah, except only in Salt Lake County (the only county in which a city of the first class is located) and in those few instances in a city or town where a unit bank is not already located and transacting business. Under the present status of the Utah law the only recourse of state banks with such a competitive disadvantage would be to convert to national banks, which would eventually destroy the dual banking system. Utah might, of course, amend its branch banking law to give to state banks the same branch banking principles as would then be accorded to national banks. This, however, would be contrary to the policy announced in Section 36(c)(1). With respect thereto the Court of Appeals in this case states:

> [T]he purpose of allowing national banks to branch was to enable them to fairly compete with state banks. . . . It is clear to us that the Congress intended to create and maintain a competitive equality between state and national banks. The trial court's interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage. . . .[47]

II

SECTION 36 (c) (1) MAKES REFERENCE TO ALL STATE RESTRICTIONS WHICH LIMIT THE EXTENT OF BRANCHING; THEREFORE, THIS CASE DOES NOT REQUIRE AN INQUIRY INTO THE AMOUNT OR THE TYPE OF STATE LAW RESTRICTIONS WHICH ARE MADE APPLICABLE TO NATIONAL BANKS.

Section 36 (c) (1) authorizes the Comptroller to approve the establishment and operation by national banks of

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[47] R 55-56, 352 F.2d at 94. See the statement of Judge Walsh in the case consolidated herewith, 236 F. Supp. at 460-61, Record in No. 73, at 30-31.

new inside branches if such establishment and operation are then expressly authorized to state banks by the law of the state in question. There is no differentiation in the statute between various types of state law restrictions, and any restriction which would prohibit or limit the extent of branching is included by the terms of the statute. There is also nothing in the legislative history, no discussion and no basis in policy, which would require a result not in keeping with the plain meaning of the statute.

We do not contend, however, that Section 36 (c) (1) incorporates state administrative discretionary procedures such as the determination of need and convenience or economic feasibility to make them applicable to national banks, the type of restrictions involved in *First National Bank v. Saxon.*[48] This case does not involve similar administrative restrictions or present such an issue; it involves an obvious legal restriction on the extent of branch banking — a simple and direct prohibition of branch banking with one take-over exception engrafted. Insofar as this case is concerned, the Utah law is so clearly a restriction upon the extent of branching that the issues on the fringe relating to administrative discretion referred to above are not involved.

(A) A Construction Making Only State Geographical Restrictions Applicable to National Banks is Not in Keeping with Section 36 (c) (1).

One of Petitioners' arguments is that the difference in language between the provisions of subparts (1) and (2) of Section 36(c) supports the Comptroller in his approval of Petitioner Bank's new branch. This argument was erroneously adopted by the trial court in this case. It reasoned that the difference in language between (1) and (2) reinforced its conclusion that the authorization by state law of *any* branch, though not of the particular branch in ques-

[48] 352 F.2d 267 (4th Cir. 1965).

tion, was the requisite "express authorization" by state law to allow national banks to establish and operate new branches without further regard to state law restrictions. In the court's opinion a footnote to this proposition reads:

> 9—Subdivision (1) refers only to the condition "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;" while subdivision (2) adds, among other things, the additional qualification that such establishment of branches by national banking associations shall be "subject to the restrictions as to location imposed by the law of the State on State banks. . . ."[49]

It is not apparent how the language of subdivision (2) quoted by the trial court supports the conclusion that the take-over proviso of the Utah statute constitutes the requisite "express authority" under Utah law for the establishment of the new branch by the Petitioner Bank. If the word "location" in subdivision (2) has any significance in interpreting subdivision (1), it would qualify rather than expand the application of state law in governing the establishment of outside branches by national banks. In fact, the language in subdivision (2) referred to by the trial court was the basis of the argument by the appellants (the national bank and the Comptroller) in the *Wayne Oakland* case "that Congress intended to permit a national bank to establish a branch at any point within the state at which the state law permitted the establishment and operation of a branch of a state bank, . . ."[50] and that the limitations contained in the state statute with respect to outside branching were not applicable to national banks. The *Wayne Oakland* case held to the contrary. Also in *Commercial Security Bank v. Saxon,* the opinion of Judge Walsh states:

> In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the

[49] R 41, 234 F. Supp. at 78.

[50] 252 F.2d 537, 540 (6th Cir.), *cert. denied,* 358 U.S. 830 (1958).

purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.[51]

Furthermore, if the view of Petitioners were upheld that only state restrictions as to location have been adopted, it would lead to results which would be totally out of harmony with any objective of Congress in enacting Section 36(c)(1), and the extent of branching by national banks in the various states would depend upon whether a state's legislature in limiting branching had elected to do so by means of location restrictions or some other type of restrictions.[52] For example, if a numerical restriction were placed on branches in one state and a location restriction in another, presumably on Petitioners' location restriction theory national banks could branch at the will of the Comptroller in the numerical restriction state but would be strictly subject to the restrictions of state law in the location restriction state.

(B) State Laws Which Limit the Extent of Branching, Such as the Utah Law, are Clearly Applicable to New Branches of National Banks.

There is no necessity in this case to define precisely which restrictions under state laws have been adopted by Section 36(c)(1), since Utah's law is clearly encompassed by that section. The legislative policy of competitive equality can be served only if all state restrictions which limit the extent of branching are considered binding upon the Comptroller. If any other position were adopted the outcome would be a competitive imbalance which is not in keeping with the policy of the federal law.

> Congress did not have to give this effect to state law. But it is highly significant that Congress did give it

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[51] Record in 73, at 31, 236 F. Supp. at 461.

[52] See, for example, the restrictions in *Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965).

such effect and that it did so pursuant to a strong and distinct "policy of equalization" for our dual banking system.[53]

The Utah statute has from its inception been restrictive of the extent of branching. Prior to 1933 branches were prohibited,[54] but in 1933 the predecessor to the present statute was enacted.[55] It contained the present take-over exception and in addition would have permitted new branches in second class cities if "the consent of all banks therein located" could be obtained. This second exception was later held unconstitutional by the Utah Supreme Court and the take-over proviso was retained on the ground it was separable from the unconstitutional portion.[56] In *Walker Bank & Trust Co. v. Taylor,* the Utah Supreme Court stressed the limiting effect of Section 7-3-6. "[O]ur statute is restrictive and, what it does not expressly permit, it prohibits. . . ."[57] Whatever the specific reason the Utah Legislature might have had in enacting the take-over proviso, there can be no doubt the general policy of Utah law is to *restrict the extent of branching.* To permit the Comptroller to freely allow national banks to branch because of the exception in Utah's general prohibition of branches would be exactly contrary to the competitive equality principle of the federal statute.

The Comptroller asserts that the take-over proviso of Utah law "does *not* embody the kind of state branching policy which Congress, by proposing deference, intended to protect . . . ,"[58] and that, therefore, it is not within the scope of Section 36(c). In so doing he now asserts arguments re-

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[53] *Jackson v. First Nat'l Bank,* 349 F.2d 71 (5th Cir. 1965).
[54] Laws of Utah, ch. 25, § 32 (1911).
[55] Laws of Utah, ch. 6, § 1 (1933).
[56] *Union Trust Co. v. Simmons,* 116 Utah 422, 211 P.2d 190 (1949).
[57] 15 Utah 2d 234, 390 P.2d 592 (1964).
[58] Brief for the Comptroller of the Currency, p. 19.

lating to competition and undue concentration of banking power as a proponent of liberalized branching by national banks which in 1933 were made by the opponents of branch banking.[59] This argument is not sound: (1) It is based on the premise that Section 36 (c) (1) was intended by Congress to favor branch banking, a policy Congress, with determined purpose, elected not to make but deferred to the states; (2) the policies of competition, which he states were intended by Congress in enacting Section 36(c)(1) would not be served, for example, First Security Bank of Utah, a national bank and the largest bank in the State of Utah having in addition to its main office forty-three branches and three banking facilities,[60] Petitioner in No. 73, would be permitted, with the approval of the Comptroller, to establish any number of branches in the city of Ogden; whereas, the Commercial Security Bank, the state bank and the Respondent in No. 73, would be prohibited from branching in that city and the competition between the two would be effectually destroyed; (3) if Utah's "take-over" proviso violates public policy or is otherwise invalid[61] the outcome of this case would be unchanged because the general prohibition in Utah law denying branches would remain effective[62] and the federal statute would continue to unequi-

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[59] *E.g.*, 76 CONG. REC. 1449-50 (remarks of Senator Bratton).

[60] OPERATING BANKING OFFICES INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION AS OF JANUARY 1, 1966.

[61] The Constitutional issue in this case was remanded by the Court of Appeals, R 49, 56, 352 F.2d at 95. In making his argument the Comptroller raises an example of a state restriction permitting new branches only if the unit wishing to branch has a charter at least fifty years old stating, "Such a restriction . . . cannot be deemed applicable to the national banks of the State." Such a restriction was recently held unconstitutional in *Security Bank v. Saxon*, Civil No. J-65-C-46, E.D. Ark., June 22, 1966. Naturally an unconstitutional restriction on branching is not applicable to a national bank or anyone else.

[62] Utah law contains a general prohibition of branches from which exceptions are made. UTAH CODE ANNOT. § 7-3-6.3 (Supp. 1965).

vocally prohibit the new branch;[63] and (4) a merger within the intendment of Utah Code Annot. Section 7-3-6 (1965 Supp.) for the purpose of this case would be assumed to be a lawful merger and one completed after necessary compliance with all superior and applicable state and federal law and regulations.

Although the Utah statute might or might not be what the Comptroller wants or even what is most desirable, it does limit the extent of branching in the state, and for that reason it is the type of state law to which Section 36(c)(1) refers in determining whether the establishment and operation by the Petitioner Bank of its new branch is "at the time expressly authorized to State banks by the law of the State in question. . . ."

III

THE QUESTION OF THE TRIAL COURT'S JURISDICTION

At the trial of this case in the District Court, Petitioner Bank challenged the court's jurisdiction by a Motion to Dismiss. The trial court found and determined that it had jurisdiction over the subject matter and denied Petitioner's motion. The only record on appeal with respect to the proceedings had in the trial court on Petitioner's motion is a minute entry: "Motion of counsel for the First National Bank of Logan to dismiss was denied."[64] Thus the issue of jurisdiction was determined by the trial court.

The Court of Appeals did not review or decide the matter of jurisdiction as thus developed but addressed itself ex-

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[63] *Cf. Security Bank v. Saxon*, Civil No. J-65-C-46, E.D. Ark., June 22, 1966.

[64] R 36.

clusively to the merits[65] and remanded certain other issues which the Petitioner Bank had raised.[66]

We continue to rely on 28 U.S.C. Section 1331 as a basis for the trial court's jurisdiction; and, in addition, we claim jurisdiction under 28 U.S.C. Section 1337,[67] a provision which does not require a minimum jurisdictional amount.[68]

CONCLUSION

The Court of Appeals should be affirmed.

Respectfully submitted,

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[65] The opinion of the Circuit Court of Appeals states: "Our sole question pertains to the authority of the Comptroller to issue such certificate." R 5, 352 F.2d at 91.

[66] R 56, 352 F.2d at 95.

[67] *First Nat'l Bank v. First Bank Stock Corp.*, 197 F. Supp. 417, 419, 421, 425 (D. Mont. 1961), *aff'd*, 306 F.2d 937 (9th Cir. 1962). Section 1337 provides:

The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

See *International Assoc. of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 684-85 & n.2, 696, *rehearing denied*, 373 U.S. 947 (1963).

[68] *Caulfield v. U.S. Dept. of Agriculture*, 293 F.2d 217, 222 n. 10 (5th Cir. 1961), *cert. denied*, 369 U.S. 858 (1962).

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Supreme Court of the United States

October Term, 1966

No. 51

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah,
A National Banking Association,
Petitioner,

v.

WALKER BANK & TRUST CO., A Corporation,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

No. 73

FIRST SECURITY BANK OF UTAH, N. A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent,

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals in No. 51 is reported at 352 F. (2d) 90, and the opinion of the district court

in that case at 234 F. Supp. 74. In Nos. 73 and 88 the court of appeals issued no opinion, other than its judgment, which is unreported. The opinion of the district court in these cases is reported at 236 F. Supp. 457.

PRELIMINARY STATEMENT

The Commonwealth of Virginia is filing this brief as amicus curiae in accordance with Rule 42 of the Revised Rules of the Supreme Court of the United States.

THE STATUTES INVOLVED

The federal statute involved is Section 36(c) of Title 12 of the United States Code, as amended, the pertinent provisions of which read as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.* * *"

The state statute involved is Section 7-3-6 of the Utah Code Annotated, 1953, as amended, the pertinent provisions of which read as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the

first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

In each of the cases before this Court, the issue is whether the Comptroller of the Currency can, under the provisions of Section 36(c), of Title 12, of the United States Code, authorize a national bank to establish a de novo branch in a locality where state law permits branching only by the "take over" of an existing bank. The petitioners contend that the Comptroller is not bound by such state statutory restriction and the respondents contend that he is.

These cases involve the question of branching within the same locality which is commonly called "inside branching", as opposed to statewide or "outside branching." The controlling subsection of Section 36(c) of Title 12 in "inside branching" cases is 36(c)(1), whereas 36(c)(2) relates to "outside branching." However, it is perfectly obvious from the arguments made by the petitioners in the lower courts, in their petitions for writs of certiorari, and in their briefs that they make no distinction between 36(c)(1) and 36(c)(2) insofar as the principle in the cases at bar is concerned. They take the position that the only restrictions of state law which are binding upon the Comptroller when he acts under either Section 36(c)(1) or 36(c)(2) are those that

relate to whether branches will be allowed at all and those that prescribe restrictions as to the geographical location of branches.[1] Although disagreeing heartily with the petitioners' interpretation of the statute, the Commonwealth agrees that there was no intent on the part of Congress in enacting the legislation which is now Section 36(c) to create different standards for branching under 36(c)(1) and 36(c)(2).

Proper interpretation of Section 36(c) is of vital concern to the Commonwealth of Virginia because of its statutes relating to branch banking, the pertinent portions of which are found in Section 6.1-39 (a) of the Code of Virginia of 1950, as amended, and read as follows:

> "§ 6.1-39. (a) No bank or trust company heretofore or hereafter incorporated under the laws of this State shall be authorized to engage in business in more than one place, except that the State Corporation Commission, when satisfied that public convenience and necessity will thereby be served, may authorize banks having paid-up and unimpaired capital and surplus of fifty thousand dollars or over to establish branches within the limits of the city, town or county in which the parent bank is located or to establish branches elsewhere by merger with banks located in any other county, city or town."

Although the merger restriction in the Virginia statute relates to "outside branches", the authorization of which is governed by 36(c)(2), if the principle advocated by petitioners in the cases now before this court is sustained, national banks would be permitted to establish de novo branches anywhere in Virginia at the discretion of the

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[1] *See Walker Bank & Trust Company* v. *Saxon*, 234 F. Supp. 74, 77 and page 16 Petitioner's brief in No. 73.

Comptroller of the Currency, whereas state banks could acquire branches outside of the locality of the parent bank only by way of the merger route. Such an interpretation of Section 36(c) would ignore completely the Congressional intent to maintain a state of competitive equality between state and national banks, and would put Virginia to the choice of changing its law so as to bring state banks back on a competitive basis with national banks or of leaving the law in its present form and watching the destruction of the dual banking system through conversion of state banks to national banks. It is highly unlikely that a state which has espoused the cause of the dual banking system for so many years would adopt the latter course. It is also not probable that the law would be changed to permit de novo branching on a statewide basis since as recently as 1962 the Virginia General Assembly, finding vigorous opposition to this system of branching, rejected it in favor of the more restricted method of statewide branching by merger only.

In an attempt to preserve the dual banking system, Virginia would most probably revert to branch banking laws similar to those in effect prior to 1962. These laws provided for de novo branches restricted to "the limits of the city, town or county in which the parent bank is located." Other branches could be acquired by merger or purchase, provided the consolidating banks were located in the same or adjoining counties or within a distance of twenty-five miles of each other and each had been in operation for more than five years. No provision was made for statewide branching.

The pre-1962 branching restrictions were clearly "location" restrictions which all parties to these cases appear to concede are binding upon the Comptroller when operating under Section 36(c). It would seem logical, therefore,

that Virginia should revert to this type of law if the petitioners here should prevail. This would not only result in a forced reversal of this Commonwealth's policy of statewide branching by merger, but would have seriously adverse consequences for national banks which the record shows have been the principal beneficiaries of the amendment permitting statewide branching by merger. Since the 1962 law became effective, there have been sixty-two mergers in which at least one national bank participated, whereas there have been eleven mergers involving state banks only.[2] With a very few exceptions these mergers would not have been possible under Virginia statutes prior to 1962.

The Commonwealth of Virginia is certain that the Congress in enacting Section 36(c) did not intend for the states to be forced to any such choice as is suggested here. In commenting upon the imbalance between state and national banks which would be created if the petitioners' position were upheld, the court said in *Commercial Security Bank* v. *Saxon,* 236 F. Supp. 457, 461:

> "* * * Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended."

With this statement the Commonwealth of Virginia heartily agrees.

SUMMARY OF ARGUMENT

The Commonwealth of Virginia has directed its argument to Section 36(c)(2) as well as to 36(c)(1) because it believes that the proper interpretation of these subsections is the same insofar as the principle in issue is

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[2] Records of the Virginia Bankers Association.

concerned. Although the language in the two subsections differs to a degree, it shows a clear intent in each to permit national banks to branch only under circumstances that would permit state banks to branch.

Assuming for the sake of argument that the language of Section 36(c) is sufficiently ambiguous to require resort to various tests that are commonly used to assist in statutory interpretation, it is submitted that application of the three principal tests used for this purpose reveal:

1. A clear legislative intent to maintain a condition of competitive equality between state and national banks in the establishment of branches, by requiring both to adhere to the standards set forth in state statutes.

2. A preponderance of federal case law in diverse jurisdictions supporting the interpretation here contended for by the Commonwealth of Virginia.

3. Administrative interpretation in accord with that here contended for by Virginia, as reflected in statements made in recent years by the present Comptroller of the Currency, a petitioner in one of the cases now before this Court.

The argument of petitioners in their briefs to the effect that the interpretation of Section 36(c) championed by Virginia and the respondents here would result in anti-competitive conditions contrary to federal policy is totally without merit. It is impossible to find logic in a contention that a law which was designed to assure competitive equality between state and national banks will promote monopoly unless it is interpreted to mean that the national banks shall have a competitive advantage over state banks. Furthermore, even if such an argument were worthy of attention, it is submitted that a system which permits statewide de

novo branching is more likely to promote monopoly than is one which permits branches to be established by merger only.

ARGUMENT

I

Introduction

The position of the Commonwealth of Virginia with respect to the issue raised in the cases at bar, is that a proper interpretation of Section 36(c) makes all branch banking restrictions contained in state statutes applicable to national banks seeking branches thereunder if the restrictions are of such a nature that failure to apply them to state and national banks equally would create a competitive disparity between the two. This position is sustained by the legislative history of Section 36(c), by numerous decisions of the federal courts construing this statute and by admissions of the Comptroller of the Currency who is one of the petitioners here.

II

The Legislative History of Section 36(c) Shows a Clear Intent to Incorporate Therein Such Conditions of State Statutes As Will Maintain Competitive Equality Between State and National Banks.

The legislative history of Section 36(c) has been thoroughly reviewed in court decisions and in the petitions and briefs of the parties. *Walker Bank & Trust Co.* v. *Saxon,* 352 F. (2d) 90; *Commercial Security Bank* v. *Saxon,* 236 F. Supp. 457; *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F. (2d) 537.[3] Consequently, no lengthy review of the history will be repeated here, but it would seem

[3] See also petitioners' briefs in Nos. 73 and 88.

appropriate to sketch in some of the more important events and statements surrounding the enactment of Section 36(c) which point up the true legislative intent to preserve competitive equality between state and national banks.

No controversy exists as to the reason for introduction of the legislation which became known as the McFadden Act, the provisions of which are now incorporated in Section 36(c)(1). It is universally agreed that the purpose of this legislation was to establish a condition of competitive equality between the national banks, which were not permitted to branch at all, and state banks, which were permitted to branch where state law permitted branching. In order to achieve this equality Congress granted national banks the right to establish "inside branches" where the state law permitted "inside branching" to state banks. At the same time the state member banks of the Federal Reserve System were restricted to "inside branching." The background of the McFadden Act, the debates in Congress that preceded its passage, and the report of the Senate Banking and Currency Committee made it abundantly clear that the sole purpose of the Act was to put national banks in *exactly* the same position as state banks insofar as "inside branching" was concerned.

A serious challenge to the principle of equality between national and state banks arose in 1932 as a result of bank failures during the depression. Senator Carter Glass and a colleague who thought that a liberalization of branch banking laws was the best answer to the bank failure problem introduced the Glass-Stegall Bill, the provisions of which would have permitted national banks to establish statewide branches in all states irrespective of state branching laws. The bill was vigorously opposed by advocates of the dual banking system who predicted the destruction of the system

if national banks were given the competitive advantage over state banks proposed in the bill. After extended and bitter debate and the adoption of an amendment offered by Senator Bratton of New Mexico to restore the principle of competitive equality, the bill emerged as the Banking Act of 1933 which has been codified as Section 36(c) of Title 12 U.S.C. Thus the attempt by Senator Glass and his followers to disregard state laws as the measuring stick of branch banking was beaten back. That Senator Glass himself recognized the intent of Congress to incorporate conditions of state law into what is now Section 36(c) is evident from a speech made by him on the Senate floor which was reported at 77 Congressional Record 3726 1933. Senator Glass said:

> "There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those States which by law permit branch banking to State Banks. It went even further under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks."

In the course of the same statement he said:

> "* * * We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State

banks in the respective States we have been unable to understand.* * *"

This analysis of the bill by its author leaves no room for doubt as to his interpretation of its meaning. He states in unambiguous language the effect of two amendments to the bill which in its orignal form ignored state law entirely. The first amendment, he said, provided that national banks could engage in branch banking only in states whose laws permitted state banks to branch. However, he said, the second amendment (the Bratton amendment) provided that even in those states which permit some form of branch banking, a national bank seeking to establish a branch "should be under the regulations required by State law of State banks."

The quoted statement by Senator Glass, the chief proponent of the bill, renders completely untenable the position of the petitioners here that the language of Section 36(c) merely means that if a state law permits branch banking in any form, national banks can establish de novo branches therein in complete disregard of restrictions of the state law such as a restriction confining branches to those acquired by merger. How can anyone seriously contend that the establishment of branches by national banks is "under the regulations required by State law of State banks" or that national and state banks are "on a plane of competitive equality" if national banks can establish de novo branches in a state whose laws restrict state bank branches to those acquired by merger.

Two other excerpts from the Congressional debate on the Banking Act of 1933 are worthy of mention as illustrating legislative intent. In 76 Congressional Record 2262-2263 (1933) Senator Vandenberg made the following statement:

> "Mr. President, the Senate has now amended the branch-banking section of the pending bill to provide that the branch-banking privilege so far as national banks are concerned shall follow the status established by State law in respect to the State privilege. I have a schedule which briefly summarizes the State status in respect to this problem in the 48 States; and inasmuch as this phase of the matter is of great importance in the interpretation of the proposed law, I ask that it may be printed in the Record."

The matter inserted in the Record was a schedule showing the names of those states which had no legislation on branch banking, those which prohibited any form of branch banking, those which permitted state wide branch banking, and those which permitted branch banking under certain conditions, including the requirement of merger.

The only logical explanation of Senator Vandenberg's statement and the introduction of the schedule is that he recognized that the bill under consideration required that national banks be subjected to specific branch banking restrictions of state law.

In the House of Representatives, Congressman Robert Low Bacon in explaining the branching provisions of the bill stated that under its provisions national banks might "establish branches at any point within the state in which they are located, provided that this is permitted by the laws of the state and subject to them." He pointed out as examples of the state laws to which the national banks would be "subject" sixteen states in which branch banking was permitted only under certain restrictions (77 Congressional Record 3949).

Every aspect of the history of Section 36(c) shows that the advocates of the principle of competitive equality between state and national banks prevailed in the final version

of the legislation. To adopt the theory of the petitioners in the cases at bar would be to deny what the Congress obviously intended. Compliance with this legislative intent permits only one practical application of Section 36(c) in branching situations. In determining whether a national bank can establish a branch in a state, the Comptroller must determine whether, under the circumstances then existing, state law would permit a state bank to establish a branch. *Commercial Security Bank* v. *Saxon* 236 F. Supp. 457, 459; *National Bank of Detroit* v. *Wayne Oakland Bank* 252 F. (2d) 537, 540. If the answer is yes, the national bank branch is permissible. If no, it is not. This interpretation affords exactly the same treatment to national and state banks. The petitioners' interpretation gives national banks a decided advantage over state banks.

III

Decisions of the Lower Federal Courts Support the Principle of Competitive Equality and the Necessity of Incorporating Conditions of State Statutes to Achieve It.

The issue involved in the cases now before this court has been the subject of a great deal of litigation in recent years. Although some of the cases have involved an interpretation of Section 36(c)(1) and some an interpretation of Section 36(c)(2), it is submitted that both classes of cases are pertinent here for the reason previously stated that the principle involved in the cases here on appeal is the same whether the branching being considered is "inside branching" under 36(c)(1) or "outside branching" under 36(c)(2). The significant thing about the cases is the fact that they all recognize the principle of competitive equality as the basis of Section 36(c) and the necessity of looking to state law to attain this objective.

After reviewing the legislative history of Section 36(c) the United States Court of Appeals, Tenth Circuit, found in the case of *Walker Bank & Trust Company* v. *Saxon* 352 F. (2d) 90, 94, intent on the part of Congress "to create and maintain a competitive equality between state and national banks" and a requirement on the part of the Comptroller when exercising his branch banking authority under Section 36(c) to "look at all the State law on branch banking not just a part of it." This court rejected the holding of the district court to the effect that the restriction of the Utah law requiring banks to "take over" another bank in order to create a branch was not made applicable to national banks by the provisions of 36(c)(1). In *Commercial Security Bank* v. *Saxon,* 236 F. Supp. 457, the United States District Court, District of Columbia, in deciding precisely the same question as the one in issue in the *Walker* case, *supra,* reached the same conclusion, for the same reasons, as the Tenth Circuit Court of Appeals did in the *Walker* case. It said that Congress had recognized "competitive equality in at least the most important areas of competition between the two systems" is essential to the survival of the dual banking system. In enjoining the Comptroller from authorizing the establishment of a de novo branch by a national bank without "taking over" an existing bank the court said it felt compelled "to hold that the exact standards of the Utah branching law must be applied" to the national bank applicant.

In *Hoosier State Bank of Indiana* v. *Saxon,* 248 F. Supp. 233, the court discussed both 36(c)(1) and 36(c)(2) and held that the Congressional purpose in passing both of them was "to foster equality in vital areas of competition between the two systems." It said that to permit a national bank to ignore an Indiana statutory restriction relating to branching

would render meaningless the provision of Section 36(c)(1) permitting national banks to branch in situations where such branching is "expressly authorized" to state banks by state law. Under the circumstances of this case, the court said, the "in branching" involved is "expressly prohibited" rather than "expressly authorized" by state law as required by Section 36(c).

In *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F. (2d) 537, and in *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, the courts, dealing in each case with the right of the Comptroller to ignore conditions of the Michigan law in authorizing national bank branches, held that Congress intended in such cases for state law to be the "measuring stick" for the establishment of branches by national banks. The practical effect of this, the court said in the *National Bank of Detroit* case, *supra,* is "that a national bank should have no greater rights than it would if it were a state bank * * *".

In *State of South Dakota* v. *National Bank of South Dakota,* 219 F. Supp. 842, *affd.* 335 F. (2d) 444, *cert. denied* 379 U. S. 970, the court in discussing Section 36(c) in its entirety, stated that its purpose was "to insure equality between state and national banks regarding the establishment of branches" and that under it "* * * state law is adopted by the federal government and made the measuring stick by which it is determined whether national banks may establish branches." The United States Court of Appeals for the Fifth Circuit used similar language in *Jackson* v. *First National Bank of Valdosta,* 349 F. (2d) 71, 74.

Petitioners cannot, nor have they sought to, contend that the holding of the above cases does not represent the great weight of authority as to the issue before this court.

IV

Administrative Interpretation of Section 36(c) in Virginia Shows Comptroller's Recognition of Merger Restriction.

Petitioners have taken the position that administrative interpretation of Section 36(c) is entitled to great weight and have cited cases in support of this proposition but have neglected to show any history of administrative interpretation of Section 36(c) other than the interpretation of the Comptroller of the Currency in the instant cases.

Assuming *arguendo* that administrative interpretation is necessary here, it is submitted that the Comptroller's interpretation in cases involving the Virginia branch banking statutes, as amended in 1962, have shown a clear recognition that he considered a restriction limiting "outside branches" to those acquired by merger as applicable to national bank branches.

In a decision handed down on June 28, 1962, denying the application for a merger of The Colonial-American National Bank of Roanoke and The First National Exchange Bank, both of Roanoke, Virginia, Mr. Saxon said:

> "Among the facts that must be considered in passing on this application is the new Virginia branch banking law which takes effect June 29, 1962, and the holding company movement which is now taking place in that state. This statute, in effect, authorizes statewide branch banking through mergers. It is not possible at this time to appraise realistically the banking structure which will evolve under this new law and the holding company movement, although pervasive changes may be anticipated."
>
> "* * *"
>
> "These banks represent two of the principal sources —being the first and second banks in size—from which initiative could be expected to flow in meeting the

future requirements of the area for larger-scale financing to facilitate economic growth. It is in the public interest to preserve the independence of these institutions to serve as experienced and effectively operating nuclei about which still larger institutions may be formed. The new Virginia statute permitting statewide branching through mergers, which becomes operative on June 29, 1962, affords a vehicle through which this alternative course may be pursued. While it cannot be said that the new authority to branch through mergers will serve all of the requirements of a balanced banking structure, as effectively as these requirements could be achieved through de novo branching, it does offer added opportunities to enlarge the size of banks, and to bring more effective employment of under-utilized resources, in response to the needs which are relevant in the present case."

In a statement dated August 31, 1962, relating to his approval of the merger of the First & Merchants National Bank of Richmond with the Augusta National Bank of Staunton, the Comptroller said:

"The resulting bank, making proper use of the new Virginia law permitting statewide branching through the technique of merger, will bring its resources and services directly to the Augusta County area with a demonstrable benefit to the convenience and needs of the community."

Again, when he approved the merger of the First & Merchants National Bank of Richmond with the Peoples National Bank & Trust Company of Lynchburg, Mr. Saxon pointed out that the Richmond bank:

"has two branches in Staunton and five branches in Newport News, all acquired this year through merger

and operating as branches under an enlightened law passed by the Commonwealth of Virginia early this year."

Surely, if consistently with earlier pronouncements is one of the tests to be applied in judging the weight of administrative interpretations as this Court has held,[4] the Comptroller's latest interpretation is entitled to little consideration. It is no answer to his conflicting interpretations that he was dealing in the Virginia decisons with Section 36(c)(2), since as previously mentioned[5] he has stated that the only difference between 36(c)(1) and 36(c)(2) is the "location" condition of 36(c)(2).

V

State Statutory Provisions Limiting Branch Banks to Those Acquired by "Take Over" or Merger Are Not Opposed to Federal Policy Favoring Competition.

Petitioners seek to support their interpretation of Section 36(c) by arguing that state statutory restrictions, such as the "take over" requirement of the Utah law, encourage monopoly and hence are opposed to federal policy. It is their position that national banks must be allowed to branch de novo in order to bring new banking blood into a community and that this is what Congress intended.

This contention of petitioners, being based as it is upon giving national banks a decided competitive advantage over state banks, does not reflect federal policy. As heretofore pointed out, Congress was given the opportunity in 1933 to pass legislation which would permit national banks to establish statewide de novo branches irrespective of state

[4] See *Skidmore* v. *Swift & Company*, 323 U. S. 134, 139, 140; 89 L ed 124, 129.

[5] See page 4, footnote 1.

laws. Yet Congress rejected the proposal on the ground that neither banking system should have an advantage over the other and that state law should be the standard by which equality would be maintained. It is obvious that Congress thought in 1933 that Section 36(c) was not anti-competitive in effect. Since the national banking authorities during the years since 1933 have recognized state branching standards as applicable to national banks and Congress has not seen fit to make any amendment to the pertinent language of Section 36(c) during that time, it follows that Congress has not found the law objectionable as tending to restrain competition.

Quite apart from the fact that no federal policy is violated by the statutory construction which the Commonwealth of Virginia here supports, petitioners cannot substantiate their claim that de novo branching provides a healthy competition between banks whereas branching by merger tends to create monopoly. The facts prove otherwise.

Virginia has sought through the years to preserve the principle of free competition between banks by enacting laws that would permit the survival of the independent unit bank. Contrary to the view of petitioners, Virginia has felt that unrestricted branch banking laws would facilitate the destruction of competition and the promotion of monopoly. With this in mind, during the years 1948-1962, Virginia restricted de novo branching to the limits of the city, town, or county in which the parent bank was located and restricted branching by merger or absorption to banks within the same or adjoining counties or within twenty-five miles of each other.

In 1962 when an expanded economy caused the General Assembly of Virginia to take note of the need for banks with

greater resources, it still was unwilling to permit statewide de novo branching but adopted the more moderate course of permitting statewide branch banking only through merger with another bank. Its purpose was to give the smaller independent bank a choice as to whether it wished to remain independent if it were approached by a larger bank wishing to merge. Where de novo branching is permitted, the larger bank is in a position to force the smaller to merge against the will of the latter by threatening it with extinction through the establishment of a de novo branch in the same locality. On the other hand, where the larger bank can acquire branches only by merger, the smaller bank can exercise free choice as to its destiny.

It is true, as petitioners contend, that branching by merger merely substitutes one bank for another, but the same result may follow from de novo branching with more disastrous consequences. Despite the fact that the de novo system advocated by petitioners may inject new banking blood into a community, it may result in the annihilation of another bank there and the dislocation of all its personnel. It is submitted that this is not the type of competition that Congress advocates.

The fallacy of petitioners' argument that de novo branching promotes competition and that more restricted types of branching have the opposite effect is illustrated by a comparison of the banking systems in Virginia and its neighboring state of North Carolina. In North Carolina where the banking industry grew up under a system of statewide de novo branching, there were as of August 31, 1966, only 142 unit banks in contrast to 253 in Virginia. In North Carolina only 1 new unit bank has been opened in the past six years, whereas 24 new unit banks have been opened in Virginia during the four years since the passage of legislation per-

mitting statewide branching by merger.[6] Under its de novo branching system, banking in North Carolina has been dominated for years by a relatively few giants in the industry. In Virginia the competition has been much more widespread by virtue of a policy that has permitted the survival of the independent bank.

It is submitted that petitioners have not, and cannot, prove their claim that unrestricted branch banking laws promote the kind of competition that is compatible with national policy whereas the opposite is true of laws which restrict the methods of branching.

CONCLUSION

The judgments of the United States Court of Appeals for the Tenth Circuit and of United States Court of Appeals for the District of Columbia Circuit should be sustained.

Respectfully submitted,

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[6] Records of Virginia Bankers Association and North Carolina Bankers Association.

CERTIFICATE OF SERVICE

I, Kenneth C. Patty, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Commonwealth of Virginia, as *amicus curiae*, in the above captioned matter, hereby certify that copies of the Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, have been served upon each of the counsel of record for the parties herein by depositing the same in the United States Post Office, with first class or air mail postage prepaid, this 21st day of September, 1966, pursuant to the provisions of Rule 33 of the Rules of the Supreme Court of the United States as follows: Theodore S. Perry, Esq., Perry and Perry, 106 Church Avenue, Logan, Utah, 84321, counsel for petitioner, The First National Bank of Logan, Logan, Utah; C. E. Henderson, Esq., 800 Walker Bank Building, Salt Lake City, Utah, 84111, counsel for respondent, Walker Bank & Trust Company; John J. Wilson, Esq., and Charles J. Steele, Esq., 815 Fifteenth Street, N. W., Washington, D. C., 20005, counsel for petitioner, First Security Bank of Utah, N.A.; James F. Bell, Esq., and Brian C. Elmer, Esq., 1001 Connecticut Avenue, N. W., Washington. D. C., 20036, counsel for respondent, Commercial Security Bank; and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, counsel for petitioner, James J. Saxon, Comptroller of the Currency.

KENNETH C. PATTY
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No. 51

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, a National Banking Association,

Petitioner

vs.

WALKER BANK & TRUST CO., a Corporation

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, a National Banking Association,

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

RESPONDENT'S ARGUMENT MAKES OTHER CONGRESSIONAL ENACTMENTS REDUNDANT

A. Congress Would Not Have Enacted 28 U. S. C. Sec. 1348 if 28 U. S. C. Sec. 1337 Gives The District Courts Jurisdiction Of Any Action Under The National Bank Act.

Even though not pleaded in its complaint as required by Rule 8 (a), Rules of Civil Procedure, Title 28, United States Code, Walker Bank apparently now relies on 28 U. S. C. Sec. 1337 in support of The District Court's jurisdiction. If 28 U. S. C. Sec. 1337 gives The District Courts of the United States jurisdiction of any action by any person to challenge the validity of actions of the Comptroller of the Currency relating to National Banks or to challenge any action by a National Bank because The National Bank Act is an Act of Congress "regulating Commerce or protecting trade and Commerce against restraints and monopolies" then there was no reason for Congress to specifically limit the jurisdiction of District Courts to suits against National Banks under the National Bank Act (Title 12, Chapter 2, United States Code) by the United States or any officers thereof, or to suits by National Banks against the Comptroller of the Currency under the National Bank Act, and to provide in all other actions (actions other than suits involving the National Bank Act) that National Banks have no greater rights in Federal Courts than other citizens of the state in which they are located (28 U. S. C. Sec. 1348). In other words the National Bank Act by itself gives District Courts no greater jurisdiction in suits against National Banks than they would have if there was no National Bank Act. Continental Nat'l. Bank of Memphis v. Buford, 191 U. S. 119, 24 S. Ct. 54, 48 L. ed. 119; Ex parte Jones, 164 U. S. 691, 17 Sup. Ct. 222, 41 ed. 601; Austin v. Altman, C. A.

N. Y. 1964, 332 F. 2d 273; American Surety Co. of New York v. Bank of California, D. C. Ore. 1941, 44 F. Supp. 81, affirmed 133 F. 2d 160.

The intent of Congress to protect National Banks from suit by every person seeking to challenge the authority of its Board of Directors is also expressed in 12 U. S. C. Sec. 93 where Congress prescribes a specific procedure for challenging the legality of actions of National Banks in order that the ability of the National Government to regulate currency will not be impaired through suits by others seeking to challenge the authority of a National Bank to conduct its business. (Here the First National Bank of Logan, had been in business at its drive-in branch for six months before its authority was challenged by Walker Bank.)

See also Mercantile National Bank v. Langdeau, 371 U. S. 555, 83 S. Ct. 520, 9 L ed. 2d 523, for a review of the legislative history of 28 U. S. C. Sec. 1348.

The National Bank Act does not say it is an act to regulate commerce, but it is "an Act to promote a national currency secured by a pledge of United States Bonds, and to provide for the circulation and redemption thereof" (12 U. S. C. Sec. 38), which seems to imply it was authorized under the power to "coin money" or to "borrow money on the credit of the United States." See Hudspeth v. Melville, C. C. A. Kan. 1942, 127 F. 2d 373.

An interpretation of 28 U. S. C. Sec. 1337 as giving District Courts jurisdiction in all suits against National Banks under United States Code, Title 12, Chapter 2, requires a reading which makes a Congressional Act redundant.

B. The Requirements of Subdivision (1) Are Not The Same As The Requirements of Subdivision (2) of 12 U. S. C. Sec. 36 (c).

It is conceded that Walker Bank, a state bank, has power to establish a "new branch" in Logan, Utah, by taking over The First National Bank of Logan as a branch. Respondent's attempt to find some distinction between branches acquired by merger with existing unit banks and establishment of new banking office buildings loses any significance when one reads the Branch Banking Act of 1927 as amended by the act of 1933 and finds that subsection (b) as now written was not added until 1962. (Pub. L. 87-721, 76 Stat. 667). Neither R. S. Sec. 5155. Feb. 25, 1927, c. 191, Sec. 7, 44 Stat. 1228, nor 48 Stat. 189, 190 contains any distinction between new branches acquired by merger with another unit bank or by erecting a new branch bank office building. Regardless of how it is established, if a bank has a branch where none existed before it is a "new branch."

Since state banks are at the present time expressly authorized to establish a "new branch" in Logan, Utah

(See second paragraph of Section 7-3-6, Utah Code Annotated, 1953) 12 U. S. C. Sec. 36 (c) (1) clearly gives such authority to a National Bank located in that city.

Walker bank claims this interpretation gives First Security Bank of Ogden, Utah (a National Bank) the power to establish another branch in Logan, Utah, without taking over The First National Bank of Logan. It is respectfully submitted that this issue is not before the Court.[1] (Walker Bank concedes we are discussing 12 U. S. C. 36 (c) (1) in its brief at page 2.) But if the Court affirms the Tenth Circuit Court of Appeals, the effect of the decision will also limit the provisions of subdivision (2) of 12 U. S. C. sec. 36 (c) and no National bank will be able to branch until it has complied with all of the requirements of state law.

---

[1]If states desire to prevent banks from branching in other communities where there is a bank or branch already located, they need only to provide that outside banks cannot branch in such cities as has been done in Michigan (See National Bank of Detroit v. Wayne Oakland Bank, 252 F. 2d 537, 6th Cir. 1948, cert, den. 358 U. S. 830). Such a law does not discriminate against National Banks. But if all requirements of state law are incorporated into the National Branch Banking law, a state can make it impossible for a National Bank to branch in its own city even though all state banks can branch in that city as is the present situation in Logan City under the decision of the Court of Appeals (Tenth Circuit).

There is no specific restriction of state law incorporated into subdivision (1).[2] In subdivision (2) at least two requirements of state law are incorporated. A restriction as to location and a restriction as to capital requirements. But if there is no authorization for branching in state law until the National Bank meets all of the procedural requirements of state law there is no reason for the restrictions as to "location" and "capital" in subdivision (2) and again the contention of Walker Bank requires a reading which makes a Congressional Act redundant.

C. The National Bank Act Expressly Provides For Different Capital Requirements Than State Banks In Establishing Inside Branches.

Most of the Argument of Walker Bank is based on the premise that Congress intended that both National

[2]Walker Bank claims that the words "such establishment" imposes an identical location restriction, but Congress did not so state and it is evident from reading the statute that the words "such establishment" refers only to establishment within the city where the bank is located as distinguished from "any point within the state." And if a state bank may branch in a city, such establishment is also permitted to National Banks under the requirements of Federal law as to Comptroller's approval and minimum capital requirements. But there is nothing in Subdivision (1) or any other Federal law that requires the National Bank to comply with all restrictions and procedural requirements of state law in seeking to branch within the limits of its own community.

and State Banks are subject to the identical requirements of state law under a theory of competive equality. But Congress expressly provides its own restrictions as to capital requirements without regard to state requirements which indicates that Congress did not intend identical requirments in establishing inside branches [see 12 U. S. C. Section 36 (d)]. The minimum capital requirements required by this subsection for two national banks in Logan under 12 U. S. C. Sec. 51 is $240,000 ($100,000 for each bank or branch plus twenty per cent paid in surplus). But Utah State law requires a paid in capital of only $60,000 in order for a state bank to establish a branch.

There is no provision in the Federal Statutes that a National Bank can branch within the city where it is located if it meets the minimum capital requirements of state law.

An interpretation of 12 U. S. C. Section 36 (c) (1) which holds that the national and state branch banking requirements are identical requires a reading which makes another Congressional Act redundant[3]

D. Requiring Petitioner To Merge Before It Can Branch Reduces Competition.

[3]In relying solely on legislative language dealing with subdivision (2) which was enacted in 1933, Walker Bank also ignores the intent of Congress in 1927 to allow National banks to have branches within the limits of the city where they are located if states banks can branch there, which intent was preserved by the Conference Committee action

The Comptroller's argument that the Utah merger provision is incompatible with the well-defined Federal policy favoring competition in banking is illustrated here. Petitioner First National Bank is proud that as a tiny unit bank it has been able to meet the credit requirements of local small businessmen in spite of competition from branches of the two largest banks in the State of Utah.

But now Petitioner is faced with a crisis. Each of the branches of the two giant banks have been able to establish drive-in offices to receive deposits and pay checks under conditions not available to Petitioner. Accordingly in 1962 at a time when the Utah State Bank Commissioner said that Utah State law permitted a state bank to branch in its own town if there was no other bank it could take over, Petitioner obtained approval from the Comptroller of the Currency to establish a drive-in branch a couple of blocks from its main office to receive deposits and pay checks. This was necessary in order that The First National Bank's efficiency in receiving deposits from its customers would not be impaired as its customers demanded the same convenience offered by the branches of Walker Bank and First Security Bank in Logan.

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in amending the Bratton Amendment by adding subdivision (1) thereto and thus preserving the McFadden Act. In 1927 Congress also showed it had no intention of incorporating the identical requirements of state law by imposing population limitations as well as capital limitations on branch banking. (See 44 Stat. 1228.)

If the decision of the Tenth Circuit Court of Appeals is sustained there appears to be no alternative but to merge and leave the small businessmen of Logan to the excessive power of giant financial institutions. Congress has expressly stated that it favors competition in the banking industry. (See Pub.L. 89-356, Feb. 21, 1966, Sec. 1, adding 12 U. S. C. 1828 (c) (5), (7). But to hold that 12 U. S. C. Sec. 36 (c) (1) incorporates the anti-competitive merger requirements of Utah State law requires a reading which makes the Acts of Congress favoring competition redundant so far as The First National Bank is concerned.

CONCLUSION

Petitioner's position is supported by the plain language of the statutes and does not conflict with language used by Congress in other laws. Respondent Walker Bank asks the Court to ignore the express provisions of at least four other separate Congressional Acts. In order that other Acts of Congress will not be made redundant the decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 51

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

WALKER BANK & TRUST CO., A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73

FIRST SECURITY BANK OF UTAH, N.A., PETITIONER

v.

COMMERCIAL SECURITY BANK

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE COMPTROLLER OF THE CURRENCY

We comment briefly here on the argument of respondent in No. 51 (the *Logan* case) that 12 U.S.C. 36(c), which authorizes the establishment of branch

237-002—66——1

banks by national banks where branch-banking is authorized by State law to State banks, has application only to branches established by the opening of a new facility (a *de novo* branch) and not to branches resulting from the acquisition of an existing bank (Br. 11). Respondent contends that the section applicable to branching by merger in Section 36(b)(2).[1] We have difficulty in understanding the relevance of this contention to the issues in this case, since that section, so far as is relevant here, expressly incorporates the standards of Section 36(c). See 12 U.S.C. 36(b)(2)(A) (note 1). At all events, the history of Section 36(b)(2) makes clear that it was not intended to limit the Comptroller's authority under Section 36(c) to authorize *de novo* branching in States like Utah which freely authorize branch banking but provide that a branch may be established only by taking over an existing bank.

---

[1] 12 U.S.C. 36(b)(2) provides:

> A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—
>
> (A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;
>
> (B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or
>
> (C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch

The McFadden Act (1927) distinguished between branches that were in operation at the time of its enactment and "new branches"—*i.e.*, those subsequently established. Section 7 of that Act, codified in 12 U.S.C. 36, made no distinction between branches established after 1927 by taking over existing banks and branches established by creating new facilities. Section 7 provided that a national bank could "retain and operate" any branch that was in lawful operation on February 25, 1927, whether on that date the branch was a branch of a State or of a national bank (44 Stat. 1228, 12 U.S.C. (1958 ed.) 36 (a) and (b)); branches established after that date were "new branches" within the meaning of Section 36(c)—whether they were established by setting up new facilities or by taking over an existing branch or bank. Thus, if a national bank took over another bank by acquisition or merger, the national bank could retain and operate that bank as a branch only if it could be established and operated as a "new" branch under 36(c). S. Rep. No. 2040, 87th Cong., 2d Sess.

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of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

In 1962 Congress amended the statute. 76 Stat. 667 (Sept. 28, 1962), 12 U.S.C. 36(b). The amendment was designed simply to permit the retention of branches of acquired banks when the branch was established after 1927, and was lawful when established, but because of changes in State law could not at the time of conversion or merger be established as a new branch under 36(c). In other words, it permitted national banks in the acquisition of State banks to take advantage of State grandfather clauses respecting the continued operation of branches whether the branch was established before or after February 25, 1927. S. Rep. No. 2040, *supra*. With respect to the establishment of branches by taking over existing banks, the amendment merely restated existing law by providing that a bank taken over by acquisition or merger could be retained as a branch if, under 12 U.S.C. 36(c), "it might be established as a new branch." 12 U.S.C. 36(b)(2)(A) (note 1, *supra*). Thus, the establishment of a branch by taking over an existing bank is still treated as the establishment of a "new" branch within the meaning, and subject to the criteria, of 12 U.S.C. 36(c); and the criteria for the establishment of "new branches" of national banks have always applied alike to branches established after February 25, 1927, whether they were established by taking over existing banks or by creating wholly new facilities.

Accordingly, it is clear that the phrase "new branches" in 12 U.S.C. 36(c) encompasses branches established after 1927 both by taking over existing

banks and by establishing new facilities. And, therefore, within the meaning of 12 U.S.C. 36(c), Utah law "expressly authorized" State banks to establish "new branches" at the time of the establishment of the branches challenged here, albeit it required that any new branch be established by acquisition of an existing bank.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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No. 73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner*

v.

COMMERCIAL SECURITY BANK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S BRIEF

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S. Rept. No. 584, 72 Cong. 1st Sess. (1932) p. 11 14
S. Rept. No. 77, 73 Cong. 1st Sess. (1933) pp. 11, 16-17 15

MISCELLANEOUS:

Annual Report to the Congress for 1923 (Annual Report of the Secretary of the Treasury for 1923, p. 732) 11
Annual Report of the Secretary of the Treasury for 1924 p. 610 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 73

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner*

v.

COMMERCIAL SECURITY BANK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S BRIEF

I

OPINIONS BELOW

The opinion of the District Court is reported in 236 F. Supp. 457. It appears in the transcript of record at page 25. The judgment of the Court of Appeals, rendered without opinion, has not been reported. It appears in the transcript of record at page 35.

II

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 18, 1965 (Tr. 3). Petition for certiorari was granted by this Court on May 2, 1966.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III

STATUTES INVOLVED

A.

Section 36(c) of Title 12 of the United States Code, as amended, provides in part:

> "36. . . . (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and
>
> (2) At any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to

[1] On the same date certiorari was granted in No. 1126 October Term 1965, on the petition of *Saxon, Comptroller* against Respondent, upon the same record as the instant one; and in No. 875 October Term 1965, upon the petition of *The First National Bank of Logan, Utah* v. *Walker Bank and Trust Company*, to the United States Court of Appeals for the Tenth Circuit. All are consolidated for argument.

location imposed by the law of the State on State banks."

12 U.S.C. 36(c)(1) was enacted in 1927; 12 U.S.C. 36(c)(2) was not enacted until 1933.

B.

Utah Code Annotated, 1953, Sec. 7-3-6, as amended, provides in part:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

IV

QUESTION PRESENTED

1. Whether, pursuant to the provisions of United States Code, Title 12, Sec. 36(c)(1), *as amended*, which empowers the Comptroller of the Currency

> to authorize national banks to establish and operate branches within the limits of the city in which said national bank is situated, if such establishment and operation are at the time expressly authorized to State banks by the laws of the State in question,

and, in view of Utah Code Annotated, 1953, Sec. 7-3-6, as amended (which authorizes Utah state banks to establish and operate branches in cities of the size of Ogden by acquiring an existing bank), the Comptroller may authorize a national bank to establish a branch in Ogden, Utah, by means other than that of acquiring an existing bank.

V

STATEMENT OF THE CASE

The facts are not in dispute. Petitioner is a national bank with its principal office and one branch in Ogden, Utah (R. 21). Respondent is a state bank with its principal office and one branch in Ogden, Utah (R. 13).

Two other state banks have their sole offices (called unit banks) in Ogden, namely, the Bank of Utah and the Bank of Ben Lomand (R. 15).

Ogden is classified as a city of the second class under the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)) (R. 15).

On June 25, 1963, Petitioner filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c)(1) requesting permission to establish a second branch in Ogden (R. 21). On July 18, 1963, Respondent brought the action below, seeking to enjoin the Comptroller of the Currency from approving such application on the ground that it would violate 12 U.S.C. 36(c)(1) because Petitioner was not taking over an existing bank for its branch (R. 12, *et seq.*).

On June 9, 1964, the Comptroller notified Petitioner that its branch application had been approved (R. 21). The Court then enjoined the Comptroller, *pendente*

lite, from issuing the Certificate of Authority to Petitioner for the branch in question, such being a prerequisite to the opening of the branch (R. 19, 20).

Upon motion of the Comptroller to dismiss the complaint, and the cross motions for summary judgment of Petitioner and Respondent, District Judge Walsh decided in favor of Respondent, filing a memorandum on December 18, 1964, in which he held that Petitioner's branch could be granted by the Comptroller only if Petitioner followed Utah law by taking over an existing bank for its branch (R. 25-33; 236 F. Supp. 457).[2]

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed, without opinion, relying entirely upon *Walker Bank & Trust Co.* v. *Saxon, supra.*

Petitioner contends that the decision by the courts below in the instant case and by the Tenth Circuit in *Walker Bank & Trust Company* v. *Saxon, supra,* are in conflict with the decision and opinion of the United States Court of Appeals for the Fourth Circuit in *First Natoinal Bank of Smithfield* v. *Saxon* (4th Cir. 1965), 352 F. 2d 267. Petitioner urges that the rationale of the Fourth Circuit be followed by this Court in this case, and that the judgment below, preventing the Comptroller from authorizing the branch to Petitioner, be reversed.

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[2] Judge Walsh expressly disagreed with the opinion of Judge Christensen of the District of Utah in *Walker Bank and Trust Company* v. *Saxon, Comptroller and First National Bank of Logan, Utah,* handed down on September 30, 1964, 234 F. Supp. 74. Judge Christensen's decision was reversed on appeal in *Saxon, Comptroller and First National Bank of Logan, Utah* v. *Walker Bank and Trust Company,* on October 26, 1965, in 352 F. 2d 90. This Court granted certiorari. See footnote 1, page 2, *supra.*

VI

SUMMARY OF ARGUMENT

(1) The governing language in Section 36(c)(1) is clear and unambiguous, requiring only that the Comptroller look to see if branch banking is permitted by state law within the city, town or village in question; if so he may permit branch banking by a national bank in such city, town, or village.

(2) Assuming, *arguendo,* that Section 36(c)(1) was not clear on its face, the Congressional history indicates that Congress did not intend the various conditions as to branching found in the state laws to be incorporated by reference into Section 36(c)(1); it intended to allow branching by national banks, in the discretion of the Comptroller, in those geographical areas where state banks were permitted to branch;

(3) The construction urged by the Comptroller and Petitioner is consonant with sound policy to exempt national banks from state control except where Congress has clearly spoken to the contrary;

(4) It would be contrary to public policy to predicate the authorization of branch banking solely upon a procedure which inherently tends to stifle competition, namely, by acquiring existing competing banks;

(5) The construction urged by the Comptroller and Petitioner is a reasonable one and is supported by the contemporaneous administrative determination of the agency empowered to enforce the Act; and therefore should be adopted.

VII

ARGUMENT

(A) Introduction

The instant controversy arises because of differing views as to the construction to be given to Section (c)(1) of Section 36, Title 12. Section 36(c)(1) states:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; * * *"

The Comptroller and Petitioner contend that Section 36(c)(1) empowers the Comptroller to authorize, in his discretion, the establishment of a branch by a national bank within the city, town or village in which the petitioning national bank is located, if the state in question authorizes branch banking within such city, town or village. Respondent, on the other hand, contends that not only must the state authorize branch banking in the respective city, town or village, but also that the Comptroller must adopt as his own and apply the conditions and prerequisites set down by the state law with regard to state branching.

In other words, under Respondent's theory, Section 36(c)(1) incorporates by reference the conditions contained in the state law applicable to branching. Under the construction advocated by the Comptroller and Petitioner, the Comptroller's discretion is not thereby circumscribed; he has the discretion to establish such

criteria as he deems in conformity with federal law and policy, needing to look to state law in the first instance only to ascertain if branch banking, *per se,* is permitted by the state in the city, town or village involved.

Bringing these contentions more precisely into focus, Petitioner and the Comptroller contend that the Comptroller may authorize the branch herein sought by Petitioner in Ogden, Utah, under such conditions as he deems appropriate and in conformity with federal policy. Respondent, on the other hand, argues that the Comptroller cannot permit the branch here in question unless Petitioner acquires a presently existing bank because, under the Utah law, a state bank cannot obtain a branch in cities of the size and class of Ogden unless it takes over an existing bank for the branch. This condition, admittedly, the Comptroller has not seen fit to impose.

(B) The Language of Section 36(c)(1) Is Clear and Does Not Incorporate as a Part of Federal Law the Conditions Under which the States Permit Branching

There is no mystery or ambiguity inherent in Section 36(c)(1). It authorizes a national bank to establish a branch within the city, town or village in which its main office is located (i.e. to establish an "inside" branch) provided:

(1) The establishment of branch banks is authorized to State banks by State law within the city, town or village involved, and

(2) The Comptroller approves the particular branch in question.

Section 36(c)(1) does no more than this.

Respondent contends, on the other hand, that Section 36(c)(1) requires the Comptroller to adopt and apply

state law standards in determining whether or not to approve a branch request by a national bank. The Act, however, simply does not say this.

If Congress had desired to incorporate by reference and impose upon national banks the conditions contained in the respective state laws dealing with branching, it could easily have done so. Indeed, it acted in this manner in Section 36(c)(2) where, with regard to the geographical location of "outside" branches by a national bank, it required that such outside branches be "subject to the restrictions as to location imposed by the law of the state on state banks."

Petitioner's construction is further substantiated by reading Section 36(c) as a whole. Sections 36(c)(1) and 36(c)(2) both contain the phrase "if such establishment and operations are . . . expressly authorized to State Banks by the law of the state in question." This language, presumably, forms the basis for the contention that both Section 36(c)(1) and 36(c)(2) incorporate the conditions of state law as to branching with regard to branching by national banks (Tr. 27, 31). If, however, such be the case, then the language in Section 36(c)(2), specifically making applicable state restrictions as to location, becomes pure redundancy.

This form of construction however, is not preferred nor will it be adopted if another reasonable construction is available which gives effect to all of the language used. *Jarecki* v. *G. D. Searle & Co.* (1961), 367 U.S. 303, 6 L. Ed. 2d 859; *United States* v. *Menasche* (1955), 348 U.S. 528, 99 L. Ed. 615. The construction urged by the Comptroller and Petitioner is manifestly reasonable. Indeed, it simply gives meaning to the language as written.

(C) The Congressional History of Section 36(c)(1) Reveals That Congress Did Not Intend To Circumscribe the Comptroller's Authority by Subjecting National Bank Branching to Conditions of State Law

The trial court, recognizing that its construction ignored the differences of language between Sections 36(c)(1) and 36(c)(2), nonetheless attempted to justify its construction upon an alleged intent and purpose of the statute (Tr. 31).[3] In the first place, courts are not free to construe a statute where its meaning is clear. *Yates* v. *United States* (1957), 354 U.S. 298, 1 L. Ed. 2d 1356; *United States* v. *Missouri Pacific R. Co.* (1928), 278 U.S. 269, 73 L. Ed. 322. Secondly, courts should confine themselves to construing a statute as written and not attempt to change or modify the law. *Iselin* v. *United States* (1926) 270 U.S. 245 at 250-251; 70 L. Ed. 566 at 569-570.

Assuming, *arguendo,* that the statute here involved is ambiguous on its face, and thus susceptible to judicial construction, it by no means follows that the intent of Congress was to graft upon the federal law here involved the varying conditions of the respective states. To the contrary, the history[4] of legislation here involved completely supports the literal meaning of the statute urged by Petitioner and the Comptroller.

Congress simply intended to authorize national bank branching, in the discretion of the Comptroller, if:

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[3] *Walker Bank & Trust Company* v. *Saxon, Comptroller, supra,* involved the same statute as the case at bar. The Tenth Circuit employed the same reasoning as Judge Walsh in the district court, namely, a Congressional intent to achieve "competitive equality" between state and national banks.

[4] Where a statute is ambiguous, resort should be had to its legislative history to determine the intent of Congress. *United States* v. *Zacks* (1963), 375 U.S. 59, 11 L. Ed. 2d 128.

(1) the branch is to be located in the city, town or village where the national bank is located; and (2) the state in which such national bank is located permits branch banking in the city, town or village involved.[5]

Prior to 1927, national banks were not authorized to have branches. *First National Bank in St. Louis* v. *Missouri* (1924), 263 U.S. 640, 68 L. Ed. 486. Many state banks, however, were empowered by their state law to branch; and state banks with branches which became national banking associations were authorized by Section 5155 of the Revised Statutes of the United States to retain and continue their branch operations.

The essential inequity inherent in this system, and particularly the adverse impact which state branching was having upon the national banking system, became a matter of grave concern to the Comptroller of the Currency, as reflected by his Annual Report to the Congress for 1923 (Annual Report of the Secretary of the Treasury for 1923, p. 732.) Accordingly, he pressed for legislation authorizing branching by national banks. (See e.g. Annual Report of the Secretary of the Treasury for 1924, p. 610; 65 Cong. Rec. 11297).

By 1926, in recognition of the fact that national banks had the chief burden of supporting the Federal Reserve system, and that they had been unable to compete with state chartered banks in a state authorizing state-bank branching, the House Committee on Banking recommended a bill, H.R. 2, declaring there

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[5] A third requirement relating to the population of the city, town or village involved was originally included but has since been deleted. If Congress had intended to incorporate state law as Respondent and the courts below urge, it is difficult to explain this requirement, or, indeed, the requirement in Section 36(d) selling capital requirements, which presumably would conflict with the law in various of the states. See p. 9, *infra*.

to be national policy on branching which would permit national banks to have branches within their home cities, towns or villages, in those states which permitted state banks to have branches (H. Rept. No. 83, 69th Cong., 1st Sess., pp. 4-5, 7). This bill, as a corollary, limited those state banks which were members of the Federal Reserve system to branching within their home cities, towns or villages (H. Rept. No. 83, *supra,* pp. 4-5, 7).

As stated by that Committee:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practical solution by stopping the further extension of state-wide branch banking in the Federal Reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." (H. Rept. No. 83, *supra,* p. 7).

H.R. 2, commonly called the "McFadden bill" after its principal sponsor, passed the House and went to the Senate.

In recommending similar views, the Senate Committee on Banking and Currency stated:

> "Under the House bill * * * branch banking would be permitted for national banks * * * at the discretion of the Comptroller of the Currency in cities where State banks can have branches, and national banks would be denied the right to have branches at all in any State which denied to State banks the right to have branches." (S. Rept. No. 473, 69th Cong., 1st Sess., (1926) p. 8).

H.R. 2, with certain modifications not here involved, was thereupon passed by the Senate and signed into law, becoming what is now Section 36(c)(1). After the passage of this legislation, Congressman McFadden summarized the conditions under which national banks were authorized to establish branches under this bill as follows:

> "First. The national bank must be located in a State which by law permits State banks to have branches. There must be a positive affirmative statutory authorization of branch bank territory in which national banks will be permitted to have branches.
>
> "Second. The national bank must be located in a city having a population of 25,000 and over before any application for a branch or branches can be considered. [This condition was deleted in 1933, 48 Stat. 162, 190.]
>
> "Third. The branch or branches must be located within the limits of the city, town, or village in which the parent bank is located. Although the word 'corporate' was inadvertently omitted in the Senate amendment in connection with the words 'limits of the city' to designate the territory to which branch banking must be confined, the debates in both houses of Congress indicate clearly that branch banking must be confined to the corporate limits of the city, town or village in which the parent bank is located, and not permitted in contiguous territory, or in what may be termed the social, economic or metropolitan area surrounding or adjacent to the city, town or village. If there is any doubt on this question, the legislative intent must govern, and it was clearly the purpose of Congress to forbid the establishment of new branches outside of corporate limits." (68 Cong. Rec. 5716, 69th Cong., 1st Sess. 1927).

It is evident, then, that the purpose of Section (c)(1) was to limit branches of national banks to the limits of the city in which the bank is located and to prevent national banks from opening branches in states which did not authorize branch banking. There was no other purpose, either expressed or implied.

Although minor amendments have been made to Section (c)(1) since its enactment, the purpose and substance have not been changed since then.

Section 36(c)(1) was enacted prior to the 1929 stock market crash. The panic and depression following that crash led in 1933 to the enactment of the Bank Act of 1933, also known as the Glass-Steagall Act (Act of June 16, 1933, 48 Stat. 162). This Act is the origin of Section 36(c)(2).

When the 1933 Act was before the Senate Banking and Currency Committee, that Committee proposed to authorize national banks to establish branches "not merely in the towns and cities in which they are located, but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws." (S. Rept. No. 584, 72d Cong., 1st Sess., (1932) p. 11). Under certain conditions, in fact, branch banking across state lines would have been permitted, provided the usual business of the bank involved extended across state lines. State banks, of course, could not have branches across state lines, so the bill certainly involved no concept of competitive equality at that point.

When this bill reached the floor of the Senate in January of 1933, it had developed considerable opposition; thus, Senator Glass, its principal sponsor in the Senate, announced on the floor that he would forego

the provision which would authorize national banks to establish banking branches irrespective of state law, rather than have the whole Act fail; instead, he stated he would accept a provision which would confine branch banking to those states in which state banks could branch. (76 Cong. Rec. 1997, 72nd Cong., 1st Sess. 1933). This concession by Senator Glass was incorporated by the so-called "Bratton Amendment" which read:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized for State banks by the law of the State in question." (76 Cong. Rec. 2079.)

To this amendment, the following clause was then added:

> "and under restrictions as to location imposed by the law of the State on State banks." (76 Cong. Rec. 2079.)

The Senate thereafter agreed to and passed the above amendment (79 Cong. Rec. 2208). The House, however, did not act upon this amendment. The next session, the Senate again passed a bill incorporating the above amendment (S. Rept. No. 77, 73d Cong., 1st Sess., pp. 11, 16-17), characterizing the branching provisions in part as follows:

> "The branches so established are also to be subject *to the restrictions as to location imposed by the law of the State upon State banks* * * *." (S. Rept. No. 77, 73rd Cong., 1st Sess., (1933) p. 11). (Emphasis added).

In the First Session of the Seventy-third Congress the House passed a different bill. The two bills were then sent to the Conference Committee for reconciliation of the divergent views between the two Houses. In conference the Conference Committee separated the first portion of the Bratton amendment relating to "inside branches" from the second portion of that amendment relating to "outside branches." And, with regard to "outside branches" only, the additional requirement that such be subject to the "restrictions as to location imposed by the law of the State on State banks" was added. (H. Rept. 254, 73rd Cong., 1st Sess., p. 29; 77 Cong. Rec. 5781). Thus, insofar as Section 36(c)(1) (which dealt with inside branches) was concerned, the Conference bill was little other than a restatement of the existing law.

During the explanation of the bill by the House Conferees to the House, the phrase "compete on equal terms" was used. 77 Cong. Rec. 5896. This phrase, however, was used solely with regard to the amendment dealing with "outside" branches, which when enacted became Section 36(c)(2). Earlier Senator Glass had spoken in terms of competitive equality—but he did not define his remarks. (77 Cong. Rec. 3726).

It thus can be seen from the Congressional history that Congress did not intend to circumscribe the authority of the Comptroller by making national bank branching subject to the same *conditions* as might be contained in the laws of the respective states. To the contrary, the legislation adopted by Congress concerned itself solely with geographical or territorial limitations, and in this regard it authorized the Comptroller to approve branching by national banks in those areas

wherein state law permitted branching. On the other hand, where a state did not permit branching within its boundaries or the boundaries of the city, town or village involved, then the right to branch therein by a national bank was similarly denied. This was the competitive equality about which Congress spoke.

The above legislative history was recognized as controlling by the Fourth Circuit in its study of Section 36(c), set forth in *First National Bank of Smithfield* v. *Saxon* (1965), 352 F. 2d 267.

In *Smithfield,* the First National Bank of Eastern North Carolina applied to the Comptroller of the Currency for authorization to establish a branch in the town of Smithfield, North Carolina. The applicant had its principal office at New River, North Carolina, and also had eleven branches in the eastern part of the State. Subsequently, the Comptroller of the Currency gave the necessary approval to the applicant Bank, but without a formal statement of facts, conclusions of law or opinions. A rival national bank, the First National Bank of Smithfield, then brought an action to have the Comptroller's determination declared illegal and enjoined. The plaintiff bank contended that the Comptroller's permission to a national bank to branch is contingent upon compliance by the Comptroller with the inquiries and ascertainments required of the State Commissioner of Banks by North Carolina law. The North Carolina law provided that no branch should be permitted save upon the approval of the Commissioner of Banks, which "may be given or withheld by . . . [him] in his discretion"; that "in exercising such discretion . . . [he] shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant

. . . its future earnings prospects, and the general character of its management"; and that the approval shall not be given until the Commissioner shall have "ascertained to his satisfaction (i) that the establishment of such . . . will meet the needs and promote the convenience of the community to be served by the bank and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch . . . and of the existing bank or banks in said community."

The plaintiff national bank argued that all of these requirements of North Carolina law were incorporated into 12 U.S.C. 36(c). In answer, the Fourth Circuit said at 352 F. 2d 271:

> "* * * We disagree with the argument. Assuming arguendo that the North Carolina statute does demand as a condition precedent to the approval of a branch, an ascertainment of need and convenience, with discretion in decision nevertheless always retained by the Commissioner, in our judgment this command has not been extended to the Comptroller by the National Banking Act."
>
> "That the phrase 'restrictions as to location' does not advert to economic factors of need and convenience, but refers exclusively to a geographical determination is quite plain from the legislative history of the Act. In Congress, debate on the bill which became the heart of the current Act, 12 U.S.C. § 36(c), supra, was between advocates of unlimited National bank branching and those favoring its equation with the branch privileges of State banks. Generally the latter had been confined to the municipality of the parent bank, to immediately adjacent areas or to other territorial regions. By way of compromise the present clause was added with the intent of

> restricting National branches to the city-wide, county-wide or State-wide delimitation circumscribing the State banks. There was no other reason for the words 'subject to the restrictions as to location imposed by the law of the State on State banks.' H. Rept. 83, 69th Cong., 1st Sess., pp. 2, 4-7 (1926); 68 Cong. Rec. 5816; McFadden Act, 44 Stat. 1228; S. Rept. 584, 72nd Cong., 1st Sess., pp 1-6, 11; S. Rept. 77, 73d Cong., 1st Sess., pp. 11, 16-17; 77 Cong. Rec. 3726, 5896; Banking Act of 1933, 48 Stat. 189, 12 U.S.C. § 36(c)."

See also: *Whitney National Bank* v. *Bank of New Orleans* (1965), 379 U.S. 411, at 413, 13 L. Ed. 2d 386 at 390, wherein this Court by way of footnote referred to Section 36(c)(2) as making applicable to national bank branches state law restrictions as to "geographical limitations."

Almost identical reasoning to that utilized by the Fourth Circuit was employed by the United States District Court for the District of Utah (Judge Christensen) in *Walker Bank and Trust Company* v. *Saxon* (D.C. Utah 1964), 234 F. Supp. 74 at 78-79. As stated *infra,* p. 5, the latter opinion was overturned, however, by the Tenth Circuit, which reached the opposite conclusion from the Fourth Circuit, erroneously we submit. It was the Tenth Circuit's opinion which the District of Columbia Circuit adopted without further comment for its decision in the instant case. Petitioner submits that the District of Columbia Circuit and the Tenth Circuit erred in their views, and respectfully urges this Court to accept the views of the Fourth Circuit.

(D) The Comptroller's Position Is in Accord With Sound Policy That a National Bank Should Not Be Regulated by the States Except to the Extent Congress Has Provided

The paramount authority of Congress over national banks, has been long recognized. This is so because national banks are instrumentalities of the federal government, *Davis* v. *Elmira Savings Bank* (1896), 161 U.S. 275, 40 L. Ed. 700. Thus, as stated in *Van Reed* v. *People's National Bank* (1905), 198 U.S. 554, 557, 49 L. Ed. 1161:

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit."

Accord: *Mercantile National Bank* v. *Langeau* (1963), 371 U.S. 555, 9 L. Ed. 2d 523; *Franklin National Bank* v. *New York* (1954), 347 U.S. 373, 98 L. Ed. 767.

When Congress enacted 12 U.S.C. § 36, it occupied the field in connection with branch banking by national banks. States may regulate branching by national banks only to the extent provided in 12 U.S.C. § 36 and no further. Nowhere in Sections 36(c)(1) or 36 (c)(2) can language be found authorizing the various conditions which exist in the laws of the respective states to be imposed upon the Comptroller as the test of whether a branch of a national bank can be established.

Indeed, such a provision would be completely out of harmony with the concept that the National Bank Act

constitutes by itself a complete system for the establishment and government of a national bank system. *Deitrick* v. *Greaney* (1940), 309 U.S. 190 at 194, 84 L. Ed. 694 at 697. And, in absence of clear and express language incorporating state law into a federal act, it is assumed that Congress intends its laws to operate uniformly throughout the nation. *Jerome* v. *United States* (1943), 318 U.S. 101 at 104, 87 L. Ed. 640 at 643; Accord: *United States* v. *Turley* (1957), 352 U.S. 407, 1 L. Ed. 2d 430.

(E) The Construction Urged by Respondent and the Courts Below Is Contrary to Established National Policy

While it is true that state laws may be applicable to a national bank under certain circumstances permitted by Congress, state law is not applied to national banks where the effect would be contrary to national policy or would frustrate the policy of national banking. *First National Bank of San Jose* v. *California* (1923), 262 U.S. 366, 67 L. Ed. 1030; *McClellan* v. *Chipman* (1896), 164 U.S. 347, 41 L. Ed. 461.

The interpretation urged by Respondent and the lower courts in this case not only frustrates the concept of an orderly unified system of national banking, but also contravenes established public policy.

The Utah statute on its face favors bank mergers and acquisitions rather than the establishment of competition, even to the point of monopoly in some instances. Thus, for example, in a city where there were but two banks, both state, the only way one of the banks could open a branch would be to acquire the other one. Such theories are, of course, directly contrary to the national policy to foster competition, as indicated by Section 7 of the Clayton Act (15 U.S.C.

18), by the Sherman Act (15 U.S.C. 1, *et seq.*), and by the Bank Holding Company Act of 1956 (12 U.S.C. 1841, *et seq.*).

Those laws were designed to encourage competition and to prevent monopolies, oligopolies or the foreclosure of markets. To construe 12 U.S.C. 36(c) as Respondent seeks, would be to promote the ability of states to run counter to the national policy on competition, and to allow states indirectly to graft upon the national banking system anti-competitive principles. Such a result should not be reached by this Court unless it is absolutely compelled by the statute. But, as is pointed out before, the statute now in question actually calls for the opposite.

Finally, it should be recognized that the substitution of the laws of the fifty states for a single uniform federal law with respect to branching is bound to create, at the very least, confusion and discord with regard to the establishment and administration of national banks. Indeed, it could well frustrate the very purposes of the national banking system and cripple the discretion which Congress intended the Comptroller of the Currency to have.

In the instant case, for example, the Utah statute provides that a bank must be in existence for at least five years before it can be acquired to be used as a branch by another bank. Assume a national bank has been in existence for less than five years, and it is in such dire financial straits as to be on the brink of failure. Another national bank is willing to acquire it so as not to have a closed bank in the community. The Comptroller, wishing to prevent the failure, determines to follow the oft-used course of preventing

a bank failure by merging the unsound bank with a sound bank. Under the theory of the courts below in the instant case, this cannot be accomplished because state law does not allow a bank to be acquired as a branch until the bank is in existence for five years. It should not be possible for the exercise of such a federal prerogative to be thwarted by state law in these circumstances.

Petitioner respectfully submits that Congress intended no such result to occur. It simply stated that it would not permit national bank branching in those geographical areas where a state would not permit it. Beyond that, however, its intention was to let the two systems compete and "The system which proves itself the better able to serve the people will in the end prevail." (77 Cong. Rec. 5896).

(F) The Position Taken by the Comptroller Herein Should be Upheld Unless Clearly Unreasonable

The Office of Comptroller of the Currency was first established in 1864. In the intervening 100 years it has been the Comptroller who has been responsible for authorizing the establishment of national banks. And, since 1927, when national bank branching was first authorized, the Comptroller has exercised the authority to approve these branches. That he has been successful in his administration is revealed by the following quotation:

> "Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. The regulation of banking may be more intensive than the regulation of any other industry, and it is the oldest system of

economic regulation. The system may be one of the most successful, if not the most successful." Davis Administrative Law Treatise, Vol. 1, Section 4.04, p. 247.

It has long been the law that when Congress authorizes an official to administer a government program, the interpretation which that administrator places upon the statute and regulation under which he acts is given great weight. In *Bates & Guild Co.* v. *Payne* (1904), 194 U.S. 106, 109-110, 48 L. Ed. 894, 895, the Supreme Court affirmed a ruling of the Postmaster General which dealt with the question of whether a particular publication should be classified third-class mail or second-class mail. The Court replied:

> ". . . where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and . . . even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

This Court reiterated this philosophy in *Skidmore* v. *Swift & Company* (1944), 323 U.S. 134, 139-40, 89 L. Ed. 124, 129 noting:

> ". . . This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of advisory origin.
>
> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason

> of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

In *Unemployment Compensation Commission* v. *Aragon* (1946), 329 U.S. 143, 153-4, 91 L. Ed. 136, 145, this Court sustained the Commission's interpretation of the Alaska Unemployment Compensation Law, stating:

> "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.' National Labor Relations Bd. v. Hearst Publications, Inc., supra; Rochester Telephone Corp. v. United States, 307 U.S. 125, 83 L. Ed. 1147, 59 S. Ct. 754 (1939)."

In the District of Columbia, the jurisdiction from which this case has come to the Supreme Court, Judge David Pine, speaking in *Cargo Carriers* v. *Snyder* (D.C.D.C. 1952) 104 F. Supp. 258, affirmed (sub. nom. *Cargo Carriers* v. *Humphrey,* 93 U.S. App., D.C. 45, 206 F. 2d 488 (1953), said:

> ". . . it has long been settled that, when the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the

law will not be interfered with unless it is clearly wrong and the official action arbitrary and capricious. *Hammond* v. *Hull,* 76 U.S. Appeals D.C. 301, 303, 131 Fed. 2d 23, 25, and cases collected therein at 259-260."

Petitioner submits that when, as in the present case, the interpretation which the Comptroller of the Currency has adopted is based upon a literal reading of the controlling statute, and is in accord with recognized principles of statutory construction, his interpretation should be sustained.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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August, 1966

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Nos. 43 and 88

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FIRST SECURITY BANK OF UTAH, N.A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 73

FIRST SECURITY BANK OF UTAH, N.A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT

I.

OPINIONS BELOW

The opinion of the district court is reported at 236 F. Supp. 457, and appears in the transcript of record at

First Security R. 25-33 and Saxon R. 28-37.[1] The court of appeals affirmed the district court by order. Its judgment has not been reported but appears in the transcript at Saxon R. 38-39. The opinion in *Walker Bank & Trust Co.* v. *Saxon*, 352 F.2d 90 (10th Cir. 1965), relied upon by the court of appeals, appears at Logan R. 37-45.

II.

QUESTION PRESENTED

Whether, pursuant to Section 36(c)(1) of the National Bank Act, the Comptroller of the Currency may authorize a national bank to establish a *de novo* branch in a city where state law prohibits a state bank from establishing such a branch.

III.

STATUTES INVOLVED

A.

Section 36(c) of Title 12 of the United States Code, as amended, provides in part:

> "36. . . . (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly author-

[1] The reference to "First Security R" is to the printed record in this Court in No. 73. Similarly, the record in No. 88 will be referred to as "Saxon R," and the record in No. 51, with which these two cases have been consolidated, will be referred to as "Logan R." Only the "Saxon R" transcript will hereinafter be cited when there is a duplication in the transcripts.

ized to State banks by the law of the State in question; and

(2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

Section 36(c)(1) relating to "inside" branches (branch offices of a bank located in the municipality in which the main office of the bank is located) is the statutory provision directly involved in this case. It contains provisions first enacted in the McFadden Act of 1927, 44 Stat. 1228 (1927), and re-enacted in the Banking Act of 1933, 48 Stat. 189 (1933). Section 36(c)(2) relating to "outside" branches (branch offices of a bank located at any point in a state other than in the municipality in which the main office is located) contains provisions first enacted in the Banking Act of 1933, 48 Stat. 190 (1933).

B.

The Utah Code Ann. § 7-3-6 (Supp. 1965) provides in part:

"The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

* * * *

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where

there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

IV.

STATEMENT

Section 36(c)(1) of the National Bank Act provides that the Comptroller of the Currency may authorize a national bank to establish a new branch within its home municipality if the establishment of such a branch is "expressly authorized" to state banks by the law of the state in question.

Section 7-3-6 of the Utah Code prohibits a state bank from establishing a new branch bank in any city, other than in a city of the "first class,"[2] in which there is already one or more banks in operation, unless such a branch is one resulting from an acquisition of a unit bank wherein an acquiring bank continues to operate the offices of the acquired bank as a branch. In other words, *de novo* branching is entirely prohibited in any city in Utah where there is an existing bank or banks, other than in a city of the "first class," but the continued operation of the office of an acquired bank as a branch is permitted.

The City of Ogden, Utah, is a city of the "second class" (Saxon R. 23) and, therefore, branching in Ogden is governed by the provisions of Section 7-3-6 of the Utah Code discussed above. At the time this action commenced, there were four operating banks in the City of Ogden: (1) the Respondent, a state bank; (2) the Petitioner, First Secur-

[2] A city of the "first class" is defined under the statute law of Utah as one with a population in excess of 90,000 persons while a city of the "second class" is defined as one with more than 30,000 and less than 90,000 persons. Utah Code Ann. § 10-1-1 (1953).

ity Bank of Utah, N.A., a national bank; (3) the Bank of Utah, a state bank; and (4) the Bank of Ben Lomand, a state bank. (Saxon R. 23).[3]

On June 25, 1963, First Security filed an application with the Comptroller of the Currency, to establish a *de novo* branch in Ogden. (Saxon R. 2). On July 18, 1963, the Respondent brought an action in the district court seeking declaratory and injunctive relief against the issuance by the Comptroller of a certificate of authority permitting First Security to establish such a branch. Respondent alleged that the issuance of such a certificate would violate the provisions of Section 36(c)(1) of the National Bank Act incorporating state law as the standard for branches of national banks, in view of the provisions of Section 7-3-6 of the Utah Code prohibiting *de novo* branching of state banks in Ogden where there are already four banks in operation. (Saxon R. 2). On June 9, 1964, the Comptroller approved the branch of First Security but, pursuant to stipulation with Respondent, has withheld the issuance of a certificate permitting First Security to open the branch. (Saxon R. 23-24).

The Comptroller moved to dismiss Respondent's complaint. (Saxon R. 21). The Respondent filed a cross-motion for summary judgment. (Saxon R. 22). Subsequently, First Security, which had been granted leave to intervene, also filed a motion for summary judgment. (First Security R. 19, 22-23).

On December 18, 1964, the district court issued a memorandum and order granting the Respondent's motion and enjoining the Comptroller from issuing the contested certificate of authority. The court held that the "purpose" of Section 36(c) of the National Bank Act was to

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[3] In addition, both Petitioner, First Security, and Respondent operate a branch in Ogden established prior to the enactment of Utah branch law pertinent to this case. A new unit bank has been established since this action was commenced.

establish "competitive equality" between national and state banks in the matter of branching (Saxon R. 34), and that "if the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, . . . the purpose of Congress in enacting clause (1) of subsection (c) would not be met." (Saxon R. 35).

The appeals of both the Comptroller and First Security from the decision of the district court were consolidated. The court of appeals affirmed the district court's decision on the authority of the opinion of the Court of Appeals for the Tenth Circuit in *Walker Bank & Trust Co.* v. *Saxon.* (Saxon R. 38-39). That case, now before this Court as No. 51, also involved approval by the Comptroller of a *de novo* branch by a national bank in Logan, Utah, a city of the "second class" in which there was an existing operating bank.[4] The Tenth Circuit Court of Appeals, like the district court in Nos. 73 and 88, concluded from a study of the legislative history of Section 36(c) of the National Bank Act, that ". . . Congress intended to create and maintain a competitive equality between state and national banks" in the matter of branching, and that it had done so by acceding to state law as the standard for branches of national banks. (Logan R. 56). Noting that under Utah law a state bank could not establish a *de novo* branch in Logan because there was an operating bank in that city (Logan R. 51), the court of appeals held that to permit a national bank to establish a *de novo* branch in Logan would violate both the letter and intent of Section 36(c)(1) of the National Bank Act. (Logan R. 55-56).

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[4] At the time the action commenced, the First National Bank of Logan was an operating bank in Logan, Utah. (Logan R. 12). Its application to establish a *de novo* branch in Logan was challenged by the Walker Bank & Trust Co., a state bank with its main office in Salt Lake City and a branch in Logan. (Logan R. 1-5, 11-13).

Accordingly, both Nos. 73 and 88 (the Ogden, Utah case) and No. 51 (the Logan, Utah case) raise the same issue of whether, pursuant to Section 36(c)(1) of the National Bank Act, the Comptroller may authorize a national bank to establish a *de novo* branch in a city of the "second class" in Utah where state law prohibits a state bank from establishing such a branch.[5]

SUMMARY OF ARGUMENT

The statutes of the fifty states relating to branches of state banks vary widely. (See Appendix A). They reflect the particular needs of each state relative to their differing economies, as well as divergent philosophies of the degree of protection which should be afforded small unit banks throughout the state from branches of large city banks. Thus, some sixteen states prohibit all branching. Twelve other states permit unlimited statewide branching. The remaining twenty-two states take a "middle ground" with widely varying restrictions. Unrestricted branching may be confined (a) to the city and/or county of the head office and/or contiguous counties; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range. Utah, for example, permits unrestricted branching in its largest city, Salt Lake City, termed a city of the "first class," but restricts branching in the cities of the state with a lesser population.

The most common provision to be found in the "middle ground" states is a prohibition against branching in a designated area where there already is an existing bank. In twelve states with such a provision (including Utah)

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[5] The Petitioner in No. 51, the First National Bank of Logan, has challenged the standing of the Respondent therein to sue. Petition for Certiorari, *First National Bank of Logan* v. *Walker Bank & Trust Co.*, No. 875 October Term, 1965, at p. 3 (No. 51, October Term, 1966). No such question is before this Court in Nos. 73 and 88.

there is an exception to this prohibition in that a branch may be established if it is as the result of an acquisition of an existing unit bank wherein the acquiring bank continues to operate the office of the acquired bank as a branch. (Appendix B). Further, in order to prevent an avoidance of branch restrictions through a program of establishing new unit banks simply for the purpose of acquisition and conversion to a branch, some states impose a time period during which the acquired bank must have been in operation before it was acquired. Utah, for example, provides that the acquired bank must have been in operation five years. Utah Code Ann. § 7-3-6 (Supp. 1965).

The existence of such a multiplicity of varying state branch laws creates a very practical problem. It is obvious that without competitive equality in such an important area as the right to branch between state and national banks operating side by side in each state, the "dual banking system" could not long survive. The class of banks suffering from the competitive disadvantage would quickly convert to the other system. In recognition of this fact, Congress has established a "policy of equalization" between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks under Section 36(c) of the National Bank Act. That Congress intended to establish such competitive equality between state and national banks in the matter of branching clearly emerges from the language of Section 36(c) and from a study of the legislative history of Section 36(c) (pp. 18-32, *infra*). Further, it is established law. The principle of competitive equality underlies the decisions of the courts of the District of Columbia and of the Tenth Circuit, now before this Court, and has been previously recognized by this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 564-565 (1934), and by numerous lower courts.[6]

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[6] See, *e.g.*, *Jackson* v. *First Nat'l Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965); *Union Savings Bank of Patchogue* v. *Saxon*,

The construction given to Section 36(c)(1) of the Act by the incumbent Comptroller of the Currency, some thirty-six years after its enactment and without any prior administrative practice, is totally irreconcilable with either the letter or intent of the law. Section 36(c)(1) permits national banks to establish new branches only if their establishment would be *expressly authorized* to state banks by the law of the state in question. It is impossible to understand how *de novo* branches can be said to be expressly authorized in Ogden, a city with four banks, under a Utah statute which prohibits *de novo* branches in any city the size of Ogden "in which is located a bank or banks." Further, the Comptroller's construction of Section 36(c) utterly destroys the congressional intent to establish competitive equality between state and national banks in the matter of branching. The clear result of his action is to permit national banks to establish *de novo* branches in locations where state banks are *prohibited* by state law from establishing such branches.

The Comptroller's argument that Congress actually intended a competitive advantage to national banks in Utah and in the eleven other states with similar statutes, is premised upon an erroneous play on words. He argues that the Utah statute permits unrestricted branch banking subject to the "method" of "take-over" which is not

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335 F.2d 718 (D.C. Cir. 1964); *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958); *State Chartered Banks in Washington* v. *Peoples Nat'l Bank of Washington*, Civ. No. 6338, W.D. Wash., February 28, 1966; *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233, 236 (N.D. Ind. 1965), *appeal pending*, 7th Cir., Nos. 15561, 15562; *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394, 401 (E.D. Mich. 1965), *appeal pending*, No. 16912, 6th Cir.; *Peoples Bank-Trenton* v. *Saxon*, 244 F. Supp. 389 (E.D. Mich. 1965); *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842, 846 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 774 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960).

among the "whether and where" state branch restrictions made applicable to national banks in Section 36(c). But the Utah statute provides that there shall be "no branch" established in a city where there is located an existing bank, except for the continued operation of the offices of an acquired bank by an acquiring bank. That is a *flat* prohibition against *de novo* branching, which is the issue here involved. Further, when a state prohibits *de novo* branching in any city "in which is located a bank or banks," that is just as much a clear cut statutory statement of "whether" branches can be established, and "where" branches can be established, as is a provision which states there shall be no branching at all, or no branching outside of the city, or no branching outside of the home office county. All of these provisions specify a *location* at or in which branching is restricted.

The Comptroller further argues that the "take-over" provision in the Utah statute "encourages" bank mergers, leading to an undesirable banking "concentration" contrary to the public policy revealed in the federal antitrust and bank merger statutes,[7] and contrary to the legislative intent of Section 36(c) of the Act revealed in the arguments of the opponents of branch banking. The argument is irrelevant. Even if the "take-over" provision were not in the Utah statute, as far as national banks were concerned, the Comptroller would still be left with the remainder of the statute prohibiting *de novo* branching under the circumstances here present, which is the issue in *this* case. Further, the argument is erroneous. A branch by "take-over" is not an independent branch authorization, as is that of a *de novo* branch. It is a *re-*

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[7] Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 (1964); Clayton Act, 15 U.S.C. § 18 (1964); Bank Merger Act of 1960, as amended, 12 U.S.C. § 1828(c) (1964), and P.L. 89-356, Feb. 1, 1966. See, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States* v. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964).

sultant from another transaction, namely, the acquisition of one bank by another, which is the subject of antitrust and bank merger statutes designed to prevent all of the evils of banking concentration extensively hypothecated in the Comptroller's Brief. Only after an acquisition has survived the scrutiny of such laws does the issue of the disposition of the office of the acquired bank even arise. Some states require the office to be closed if branches are otherwise forbidden. Some states, like Utah, permit the continued operation of the banking office. Such authority, of course, can be highly beneficial, as in the case of the acquisition of a failing bank by another bank which continues to provide banking service to the public from the existing office of the acquired bank as a branch.

Finally, the Comptroller has misconstrued the legislative history of the McFadden Act of 1927, and of the Banking Act of 1933, in contriving his theory that a "take-over" provision was not "in the minds of the opponents" of branching when they "compromised" with the proponents of branching in agreeing to Section 36(c). The McFadden Act of 1927 was *not* motivated by any desire to extend branch banking to communities where that sort of banking could be useful. It was motivated by the sheer necessity of giving national banks competitive equality with state banks in cities where state law permitted state banks to branch in order that the national banking system would survive. The Banking Act of 1933 reaffirmed that principle of competitive equality. Branch restrictions similar to those in the Utah statute were in existence throughout the period that these two statutes were debated, and had Congress intended to carve such restrictions out as an exception to the principle of competitive equality, it most certainly could have done so. It did not do so, and, therefore, the Comptroller's construction of Section 36(c)(1) patently violates the congressional intent to establish competitive equality between national and

state banks in the matter of branching, upon which depends the continued viability of the dual banking system in this country.

ARGUMENT

I. The Courts Below Properly Held That the Comptroller of the Currency Was Without Statutory Authority to Authorize First Security Bank of Utah to Establish a Branch Bank in Ogden, Utah.

A. *In the National Bank Act, Congress has adopted a "policy of equalization" between national and state banks.*

Respondent does not quarrel with the proposition, advanced with considerable vigor by the Petitioners, that national banks are federal instrumentalities subject to the paramount law of the United States. That issue has long since been resolved in the great constitutional debates which surrounded the creation of the First (1791-1811) and Second (1816-1832) Banks of the United States holding charters from Congress.[8] Although many persons, including Jefferson, who opposed the creation of the First Bank, and Jackson, who vetoed the charter of the Second Bank, felt that Congress had no constitutional authority whatever to charter banks, Chief Justice John Marshall set the matter to rest in his opinion in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). While recognizing that "it does not appear that a bank was in the contemplation of the framers of the Constitution," he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the federal government to assist in the implementation of the federal government's fiscal powers which were specifically

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[8] See e.g., CONANT, A HISTORY OF MODERN BANKS OF ISSUE (1915); KANE, THE ROMANCE AND TRAGEDY OF BANKING (1923); PROCHNOW, AMERICAN FINANCIAL INSTITUTIONS (1961).

granted to Congress by the Constitution. The question of the paramount authority of Congress over national banks has, therefore, long since been settled.

Nor does Respondent quarrel with the corollary to the principle set forth above that Congress, *if* it wished to do so, could have barred the applicability of state law to the operations of national banks. The question, however, which forms the pivotal background for the principal issue in this case, is the *extent* to which Congress elected to permit the applicability of state law to national banks, and, indeed, the extent to which it intended to *adopt* state law as the standard for banking operations of national banks.

The creation of the dual banking system by the addition of a system of national banks under federal charter operating side by side in each state with state banks under state charter required Congress to *affirmatively* decide this question.[9]

The necessity for such affirmative action arose because of the fact that national and state banks are competitors for depositors in each state. It is elementary economics that although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an

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[9] It did not do so immediately because the "birth" date of the dual banking system, as we know it today, must realistically be placed some time later than the passage of the National Bank Act. In 1865, Congress placed a prohibitive tax on state bank notes, then the principal source of state bank income, with the avowed purpose of putting state banks out of business. As a result the number of state banks declined drastically and the survival of the state banking system was largely accredited to the growth and profitability of deposit banking. See sources cited in note 8, *supra*. By 1892, however, almost 30 years after the prohibitive bank note tax, the number of state banks overtook the number of national banks and the dual banking system may by then be considered as having been firmly established. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES 15, 418 (1941).

equality in certain basic competitive areas. If one or the other class of banks in a particular state has far more liberal rights and privileges than the other in such important areas as the right to branch, to perform trust functions, to pay interest on deposits, or charge interest on loans, etc., the underprivileged banks would quickly convert to the other system leaving the dual banking system an empty shell. The district court below made this point very succinctly at 236 F. Supp. 460 (Saxon R. 33):

> "It seems clear to the Court that in order for the 'dual banking system' of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21-213), to continue to function as such there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking."

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between national and state banks by *adopting* state law as the standard for national banks in most of the important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to "give security" for state deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. This Court ruled in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the

National Bank Act. At 292 U.S. 564-565, Mr. Justice Brandeis, writing for the Court, said:

> "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization." (Footnotes omitted.) (Emphasis supplied.)

In footnote 3, relating to the policy of equalization as applied to branches, the Court cited both the McFadden Act of 1927 and the Banking Act of 1933 from which subdivisions (1) and (2) of Section 36(c) of the National Bank Act were derived.

Thus, some of the more important instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1964). (b) *Fiduciary powers.* The Comptroller may grant a permit to national banks, "when not in contravention of State or local law," to "act as a trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92(a) (1964). (c) *Interest on loans.* National banks may charge interest on loans allowed by the law of the state where the bank is

located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local federal reserve bank. 48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1964). (d) *Interest on time and savings deposits.* National banks may not pay a greater rate of interest than the maximum rate authorized by law upon such deposits by banks organized under the laws of the state in which the national bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371 (1964). (e) *Capitalization.* In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1964). (f) *Merger and conversion.* No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. § 214c (1964).

The foregoing principle was reflected by the district court below as follows, at 236 F.Supp. 460 (Saxon R. 33):

> "Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[10] In this manner, states are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks."

Secondly, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. Sometimes it made a specific reservation of

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[10] 12 U.S.C.A. §§ 36(c), 51, 85, 92(a), and 214c. (Footnote in original.)

power, as for example, the reservation to the state of broad areas of taxation of national banks, 44 Stat. 223-24 (1927), 12 U.S.C. § 548 (1964), and the reservation of powers over bank holding companies, and bank subsidiaries, in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1964). The courts have also enunciated this general principal on a number of occasions. Thus in *First Nat'l Bank* v. *Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization," this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 292 U.S. 559, 565-6.[11]

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It is thus very important to note at the outset of a consideration of the issue in this case that Congress has given a *special* significance to the applicability of state law to the national banks which it has created. It has *intended* an applicability of such law in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive. It is in this light that the issue before this Court must be considered.

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[11] See, also, *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

B. ***Nowhere has the congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow state law as the standard for the establishment of branches of national banks.***

A review of the legislative history of Section 36(c) will demonstrate the positive, unequivocal, and dominant expression of congressional intent to insure equality between national and state banks in the matter of branching by the establishment of state law as the standard for branches of national banks.

1. *The absence of competitive equality prior to 1927.* Between 1864 and 1927, the National Bank Act did not provide for the establishment of branches by national banks. This Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no authority to branch. *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). The law of many states, on the other hand, permitted state chartered banks to establish branches.

Prior to the turn of the century, this situation created no problem. At that time there only were 87 banks (82 state and 5 national) operating a total of 119 branches, most of which were outside of the head office city. By the end of 1923, however, there were 671 banks (580 state and 91 national) operating 2,054 branches, most of which were in the head office city.[12] In his Annual Report for 1923, the Comptroller of the Currency, after discussing the matter, said:

> "If, however, state member banks engage in unlimited branch banking, it will mean the eventual destruction of the national banking system. . . ." [13]

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[12] BANKING STUDIES, note 9, *supra*, at p. 428.

[13] H.R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924).

And in his 1924 Report, at which time there were some twenty states permitting some form of branch banking,[14] he said:

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city banking in my opinion involves the question of the perpetuation of the national banking system." [15]

By this time, Congress had become aware of the problem. The House Banking and Currency Committee held hearings in April of 1924 at which the Comptroller of the Currency reiterated his warning. He said:

> "But I would like to get down to the essence of the particular situation confronting us, what I am confronted with every day in my office. Our national banks are very clearly slipping . . . . It is the branch-banking situation which is forcing the issue. For example one bank with $60,000,000 deposits, one of the largest banks in the South, nearly left the system this year and it was only because we were able to persuade them of the probability of legislative relief and that they would be put on a parity with State banks as regards branch banking that they determined to retain their charter." [16]

The House Committee then reported out a bill, the purpose of which was to equalize national and state bank

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[14] Arizona, California, Delaware, Georgia, Maryland, North Carolina, Rhode Island, South Carolina and Virginia permitted statewide branch banking; Maine and Louisiana permitted county-wide branching; and Kentucky, Michigan, Pennsylvania, Tennessee, Wyoming, Massachusetts, Mississippi, New York and Ohio permitted city-wide branching. Some of these states had certain limitations. See 66 Cong. Rec. 1577 (1925).

[15] H.R. Doc. No. 457, 68th Cong., 2d Sess. 4 (1925).

[16] *Hearings before the House Committee on Banking & Currency on H.R. 6855*, 68th Cong., 1st Sess. 34 (1924). See also pp. 17 and 30.

branching opportunities by granting national banks the right to establish branches in their home-office towns, where such branches were permitted state banks by state law, and by limiting branching by state bank members of the Federal Reserve System (then, as now, the largest of the state banks) to such in-town branches.[17] The House Report said:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [18]

And when the bill reached the floor, Representative McFadden, its sponsor, said that:

> "The business of banking is a competitive commercial enterprise like any other business which makes a profit through the rendition of service to the public. Under our financial system where in each State of the Union there are two systems of banking—National and State—each in natural competition with the other for business, it is necessary for their mutual existence that their charter powers be substantially equal. It is especially important that the national banks be not left in a position in the Federal reserve system, being compulsory members of that system, where they are unable to meet the competition from the State member banks." 65 Cong. Rec. 11296 (1924).

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[17] H.R. Rep. No. 583, 68th Cong., 1st Sess. 3 (1924).

[18] *Id.* at 5.

Later, after noting that many large national banks had withdrawn from the national banking system and entered the state banking system "in order to place themselves upon an equal competitive basis with the State banks in their respective localities," 65 Cong. Rec. 11297 (1924), he said:

> "I may say here that permission for national banks to meet the competition of State banks engaged in branch banking in certain large cities is absolutely vital to the maintenance of the national banking system. It is an economic fact easily demonstrated by reference to recent banking history that the national banks in those cities where the State banks are engaged in branch banking will gradually die out for want of the power to meet their competitors on equal terms unless this provision of the bill is enacted into law." 65 Cong. Rec. 11298 (1924).

The bill which passed the House, however, failed of passage in the Senate in the closing days of the 68th Congress.[19]

2. *The McFadden Act of 1927.* The bill which ultimately became the McFadden Act of 1927 passed during the 69th Congress. Competitive equality was achieved by granting national banks the right to have intra-city branches "if such establishment and operation are at the time permitted to State banks by the law of the State in question," and, at the same time, limiting state bank members of the Federal Reserve System to intra-city branching. 44 Stat. 1228 (1927), as amended 12 U.S.C. § 36(c) (1964); 44 Stat. 1229 (1927), 12 U.S.C. § 321 (1964).

One important additional indication of the mood of Congress in making it clear that the question of the desirability of branches was a matter strictly up to the *states*

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[19] H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926).

to decide emerged from the Senate rejection of the so-called "Hull amendments" to the House bill. The House bill (H.R. 2) had originally proposed that national banks and state member banks might only establish inside branches in states permitting such branches at the time of the enactment of the bill.[20] No right was given to such banks if, at a *later* time, state law permitted state banks to establish inside branches.[21] The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on state legislatures to decline to expand branch authority, and that the matter of branching privileges was a matter for the *states* to decide. It said:

> "The real purpose of the Hull amendments, as shown by the testimony given before your committee, is to bring pressure to bear upon the leading bankers in States which now prohibit branch banking by depriving them of the motive to seek a change in the State laws favorable to branch banking. It is to coerce them to remain silent. Your committee feels that this is an unprecedented policy for the Federal Government to pursue and constitutes an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." [22]

The specific language contained in Section 7 of the bill reported by the Senate Banking and Currency Committee provided:

> "(c) A national banking association may, after the date of the approval of this act, establish and operate

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[20] Note 19, *supra*, at 4-5.

[21] These amendments were made on the floor of the House to H.R. 8887 which had passed the House the previous Session. H.R. 2 was substantially the same bill as H.R. 8887. H.R. Rep. No. 83, 69th Cong. 1st Sess. 2 (1926).

[22] S. Rep. No. 473, 69th Cong., 1st Sess. 9 (1926).

> new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question." [23]

Section 9 also provided that no state member bank of the Federal Reserve System

> ". . . may retain or acquire stock in a Federal Reserve Bank except upon relinquishment of any branch or branches established after the date of the approval of this act beyond the limits of the city, town or village in which the parent bank is situated." [24]

The Report concluded:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [25]

The Senate position was adopted in Conference.[26] The bill was finally approved on February 25, 1927, and became known as the McFadden Act of 1927. Representative McFadden in explaining the bill as finally passed, said:

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and *competitive equality* has been estab-

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[23] *Id.* at 3.

[24] *Id.* at 4.

[25] *Id.* at 14.

[26] H.R. Rep. No. 1481, 69th Cong., 1st Sess. 6 (1926).

lished among all member banks of the Federal reserve system." 68 Cong. Rec. 5815 (1927) (Emphasis supplied.)[27]

3. *Banking Act of 1933.* During the depression, a fundamental challenge to the principle of competitive equality in branching occurred. Many persons felt that many bank failures during the Bank Holiday were due to the fact that small rural banks were not strong enough to weather economic adversity, and that these locations could best be served by branches of larger and stronger banks. Their view was that branch banking should be authorized for national banks *regardless* of state branch law in order to meet what was considered to be a crisis in banking.[28]

This view was also held by the dominant banking figure of the times, Senator Carter Glass of Virginia. He was the author of a bill, S. 4412, which was reported by the Senate Banking and Currency Committee in 1932, and which proposed to expand the authority of a national bank to establish branches granted in the McFadden Act of 1927 beyond just the municipality in which its main office was located, *irrespective* of state law. The Senate Report, in its section under "Insolvency of Banks," said:

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[27] The statute as finally passed also contained a grandfather clause applicable to all pre-1927 branches. It also imposed one additional restriction upon branching by national banks, regardless of whether state law permitted unlimited intra-city branching, by including a provision limiting the number of branches in cities with a population of 100,000 persons. 44 Stat. 1228. This provision was repealed by the Banking Act of 1933 and replaced with a provision gearing the number of branches to a graduated bank capitalization dependent upon population, 48 Stat. 162-190, which remained the law until 1952 when it was repealed. See H.R. Rep. No. 2423, 82d Cong., 2d Sess. (1952).

[28] See, *e.g.*, testimony of Comptroller of the Currency, J. W. Pole, during the 1931 hearings before the Subcommittee of the Senate Banking and Currency Committee. Hearings before a Subcommittee of Senate Committee on Banking & Currency pursuant to S. Res. 71, 71st Cong., 3d Sess. 7-10 (1931). See also, 75 Cong. Rec. 9896 (1932).

". . . provision for branch-banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential and due provision for it is made. Specifically, what is proposed is the grant of power to establish branches of national banks not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws."[29]

This proposal met with vigorous opposition. It was obvious that if national banks were granted a competitive advantage over state banks in the matter of branching, state banks would convert to national banks and the state banking system would be destroyed, unless the state legislatures in all of the non-branch or limited-branch states moved immediately to conform their statutes to this unrestricted branch proposal—the reverse effect of the situation in 1922-27 when the Comptroller argued that unless national banks were given the right to branch in competition with state banks, the national banking system would be destroyed. Thus, Senator Norbeck, writing for the Minority of the Senate Committee "in protest against the proposed extension of the branch banking," said:

"In speaking of our banking system, we must keep in mind that we have:

(1) A system of national banks chartered and supervised by the Federal Government.

(2) We have a competitive system, that of State banks, chartered and supervised by the States.

There is difference of opinion among well-informed people as to their comparative merits, and certainly there is a great desire on the part of certain people to wipe out the State banking system. What can not be done directly by law may be done by giving the

[29] S. Rep. No. 584, 72d Cong., 1st Sess. 11 (1932).

national system such an advantage that the competitive system can not exist." [30]

The debate continued on the floor of the Senate in 1932 and 1933. Senator Glass pressed the need for statewide branching regardless of state law in order that larger, stronger banks could take over smaller rural banks and convert them into branches. 75 Cong. Rec. 9892, 9896-7 (1932); 76 Cong. Rec. 1995 (1933).

Senator Norbeck led the opposition proposing an amendment

> ". . . to strike out section 19 of the bill, which permits an enlargement of the branch-banking privileges.
>
> I do that mainly because I believe in the American system of banking. We have a dual system. We have two systems. We have one controlled by the States, we have another one controlled by the Federal Government. The two have grown up side by side. I think they have rendered splendid service, and I think we should be ever jealous of anything that will tend to destroy one system for the benefit of the other." 75 Cong. Rec. 9974 (1932).

Senator Glass' unlimited branch expansion position—regardless of state law—was eventually defeated.

The bill was finally passed after an amendment was adopted on the floor of the Senate whereby national banks could establish out of town branches if such branches could be established by state banks by the law of the state in question, thus restoring the principle of competitive equality. This amendment was known as the Bratton amendment, and, as it finally emerged, was itself amended by amendments of Senators Wheeler, Copeland and Blaine.

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[30] S. Rep. No. 584, 72d Cong., 1st Sess., Pt. II (Minority Views) 1 (1932).

Senator Bratton of New Mexico said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 Cong. Rec. 1449 (1933).

Accordingly, he proposed an amendment which read as follows:

> "A national banking association may establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 1997 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said:

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." *Ibid.*

He requested that the words "expressly authorized" be substituted for the word "permitted" in the Bratton amendment, which he explained as a desirable to handle his concern that a state statute silent on the matter of branching might be construed as permitting branch banking.[31]

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[31] The following interchange at 76 Cong. Rec. 1997 (1933) between Senators Glass and Wheeler set forth the purpose of the amendment:

[Footnote continued on following page.]

Senator Copeland also offered an amendment to the Bratton proposal reading: "if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 2080 (1933).

The Bratton amendment "as perfected" was subsequently read by Senator Bratton as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized for State banks by the law of the State in question. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000." 76 Cong. Rec. 2079 (1933).

[Footnote 31—Continued]

"Mr. GLASS: What is the difference between authorization and permission?

Mr. WHEELER: Quite a vast difference, if the Senator will permit me to say so, by reason of this fact:

In the State of Montana and in a number of other States there is no law expressly either prohibiting or permitting State branch banking; but the State bank examiner has held that there is nothing in the charter of the State banks permitting a branch bank. Under that construction, in my humble opinion, branch banks could be established in that State unless they were expressly prohibited by the law of the State. Consequently, I wanted a provision to be placed in the statute that branch banks shall not be permitted in a State unless the legislature or the people themselves, through an initiative, actually by law say that they shall be permitted there.

Mr. GLASS: Mr. President, I have never been in favor of subterfuge of any nature in legislation, and I am sure the clear-headed distinguished Senator from New Mexico is not proposing to engage in any subterfuge.

Mr. WHEELER: Oh, no.

Mr. GLASS: What we mean is that national banks may have branches in those States which permit the same privilege to State banks."

At this point, the following colloquy took place:

> "Mr. BLAINE. May I inquire further of the Senator if this language is embraced in the amendment which he proposes?—
>
> And under restrictions as to location imposed by the law of the state on State banks.
>
> Mr. BRATTON. Mr. President, that is not included in the text as I read it. The Senator from Wisconsin suggested that amendment to me; and if he proposes it, I shall be agreeable to it." 76 Cong. Rec. 2079 (1933).

Senator Blaine did not amplify or explain the purpose of his amendment and there was no further discussion of the matter. Including the Blaine amendment, the Bratton amendment then read:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000." 76 Cong. Rec. 2205 (1933).[32]

As such, the amendment passed the Senate on January 21, 1933. 76 Cong. Rec. 2208.[33]

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[32] At the request of Senator Norbeck a proviso was added reducing the capital to $250,000 in states with less than 1 million population which have no cities of more than 100,000. 76 Cong. Rec. 2207 (1933). See note 27, *supra*.

[33] Immediately thereafter Senator Vandenberg withdrew an amendment which he had proposed as an alternative to the Bratton amendment. 76 Cong. Rec. 2208 (1933). Senator Vandenberg, like Senator Glass, proposed an amendment to permit branches of na-

No bill passed the House prior to the expiration of the 72d Congress. Accordingly, in May of 1933, both the Senate and House Committees on Banking and Currency favorably reported legislation, S. 1631, and H.R. 5661, which contained the Bratton amendment as passed in the prior session. S. Rep. No. 77, 73d Cong., 1st Sess. 11, 16-17 (1933); H. R. Rep. No. 150, 73d Cong., 1st Sess. 4 (1933).

Senator Glass in reporting on S. 1631 on the floor of the Senate, said:

> "There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those states which by law permit branch banking to State banks. It went even farther under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks.
>
> How any fair person may properly object to a provision of that sort, I do not understand. We here in

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tional banks regardless of state law, but with a more restricted privilege of branching limited to communities where there were no banking facilities whatever, or by the acquisition of an existing banking facility. 76 Cong. Rec. 1330 (1933). Senator Vandenberg characterized his amendment as one with respect "to proven need and to geography." 76 Cong. Rec. 2206 (1933). When the Bratton amendment, as amended, passed, thereby ending the debate, there was no point in pursuing the matter any further, and Senator Vandenberg withdrew his amendment stating that "with the geographical limitation in place any other limitation would be inappropriate." 76 Cong. Rec. 2208 (1933).

> the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of *competitive equality* with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate." 77 Cong. Rec. 3726 (1933) (Emphasis supplied.)

After passage by both the House and Senate, the bill went to Conference. The Conference Committee amended the phrase "law of the State in question" in the first part of the Bratton amendment to read "statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition." No explanation was given for the insertion of this language. At the same time the numbers of (1) and (2) were added to form the present subdivisions of Section 36(c). H.R. Rep. No. 254, 73d Cong., 1st Sess. 29 (1933).

During the debate in the Senate on the acceptance of the Conference Report, Senator Long of Louisiana, who had sought to defeat the provisions of the Glass bill, 76 Cong. Rec. 1330 (1933), and had joined in the filibuster against it, stated that "we have only undertaken to secure equal treatment for State banks" and that the Conference Report had substantially achieved that result. 77 Cong. Rec. 5862 (1933). While in the House, Representative Luce, a member of the Conference Committee, reported that another member of the Committee had

> ". . . withdrawn the obstacle in the way [of agreement] by consenting to branch banking in States that explicitly permit it for banks chartered under their own laws, such States being now a dozen or so in number. In the controversy over the respective merits of what are known as "unit banking" and "branch

banking systems", a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail." 77 Cong. Rec. 5896 (1933).

The Banking Act of 1933 was finally enacted on June 16, 1933. National banks were permitted to establish out-of-town branches if such branches were authorized to state banks under state law. At the same time the restriction was removed on branches of state banks which were members of the Federal Reserve System, previously imposed by the McFadden Act of 1927. 48 Stat. 164, 12 U.S.C. § 321. Thus, the Banking Act of 1933 established the same competitive equality between national and state banks in the matter of branching outside city limits which the McFadden Act of 1927 had established for inside branches.

* * * *

The compelling conclusion reached from the foregoing review of the legislative history of the McFadden Act of 1927 and the Banking Act of 1933 is that Congress felt that it was imperative for the preservation of the dual banking system that there be competitive equality between national and state banks in the matter of branch banking. The manner in which Congress achieved that competitive equality was by adopting state law as the standard for the establishment of national bank branches.

The foregoing construction of the legislative history of Section 36(c) of the National Bank Act is now established law.

As noted at p. 15, *supra*, Sections 36(c)(1) and (2) were cited by this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 565 (1934) as representative of the "policy of equalization" established in the National Bank Act.

It was, of course, the construction given to the legislative history in the case below:

The district court said at 236 F.Supp. 457, 461 (Saxon R. 35):

> "If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks."

The court of appeals affirmed on the authority of the Tenth Circuit's decision in *Walker Bank & Trust Co.* v. *Saxon*, now before this Court as No. 51. The Tenth Circuit said at 352 F.2d 90, 94 (Logan R. 55):

> "With this, our review of the history of branch banking and § 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933 . . . ."

The Sixth Circuit, in holding that the Comptroller was prohibited by Section 36(c) from authorizing a national bank to establish a branch in a city after the establishment of a state bank there, in view of the provision of Michigan law that "no branch shall be established in a

city or village in which a State or National bank or branch thereof is then in operation," said in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958):

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank."

The Fifth Circuit, in holding that where state law prohibits a bank from having more than one additional "bank office" in the same city, the state Superintendent of Banks has standing to raise the question whether a national bank's drive-in facility is a "bank office," said in *Jackson* v. *First Nat'l Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965):

> "We start with the proposition that the source of First National's authority to open up the disputed drive-in window must be found in § 36(c) of the National Bank Act. That statute is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and in South Dakota, supra, at 846, that Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system."

The reference to the "policy of equalization" no doubt came from the opinion of this Court in *Lewis* v. *Fidelity*

& Deposit Co., 292 U.S. 559 (1934). See p. 15, *supra*. The reference to "South Dakota" is to *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965) where the court said, at 846:

> "It is clear that the purpose of Congress in adopting § 36(c) was to insure equality between state and national banks regarding the establishment of branches. . . . The adoption of § 36(c) was a practical way of accomplishing this purpose."

In addition to the foregoing, numerous other cases can be cited for the same proposition. Thus, in *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233, 236 (N.D. Ind. 1965), *appeal pending*, 7th Cir., Nos. 15561, 15562, the court said:

> "The legislative history of these sections [Secs. 36(c)(1) and (2)] pursuasively supports plaintiff's contention that the policy and purpose behind both sections was to foster competitive equality between federal and state banks 'in at least the most important areas of competition between the two systems' including location restrictions as to branching."

In *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394, 401 (E.D. Mich. 1965), *appeal pending*, No. 16912, 6 Cir., the court said:

> "It will be observed in the above statutory enactment [Sec. 36(c)] that the law of the state involved is to be determinative as to the problem of branching. National Banks were given the same opportunity for branching as state banks, thus perpetuating the dual banking system."

See, also, *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960); *Union Savings Bank of Patchogue* v. *Saxon*, 335 F.2d 718 (D.C.Cir. 1964); *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963); *Peoples Bank-Trenton* v. *Saxon*, 244 F.

Supp. 389 (E.D. Mich. 1965); *State Chartered Banks in Washington* v. *Peoples Nat'l Bank of Washington*, Civ. No. 6338, W.D. Wash., Feb. 28, 1966.

Thus the principle for which the Respondent contends, namely, that the language and legislative history of Section 36(c) of the National Bank Act reflects the intent of Congress to establish competitive equality between national and state banks in the matter of branching, is now existing law under decisions of the courts of appeals for the Fifth, Sixth, Tenth, and District of Columbia Circuits, and as well in decisions of district courts in the Third, Seventh, Eighth, and Ninth Circuits.[35]

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[35] Petitioners seek to distinguish the foregoing massive weight of authority against their position on the tenuous grounds that other than the two cases below and the *Jackson* and *Hoosier State Bank* cases which arose under Section 36(c)(1) of the Act, all of the cases cited involved an "outside" branch situation specifically falling under Section 36(c)(2), rather than an "inside" branch falling under Section 36(c)(1), the provision here involved. However, the courts in studying the legislative history of Section 36(c) in those cases did not limit their study to Section 36(c)(2). Their conclusion that Congress intended competitive equality between national and state banks in the matter of branching was based upon a study of *both* subsections 36(c)(1), enacted in the McFadden Act of 1927, and 36(c)(2), enacted in the Banking Act of 1933. Further, it must be noted that all Petitioners in this case freely discuss the legislative history of the Banking Act of 1933 in their briefs as relevant to a determination of the issue before this Court, which would strongly suggest that they do not really attach any significance to the "distinction" which they offer to the foregoing cases. Their position, candidly stated, is that all of these cases are wrong and should be reversed by this Court.

C. *The construction given to Section 36(c)(1) of the National Bank Act by the Comptroller conflicts with the plain meaning of the words used therein, and violates congressional intent to insure competitive equality between national and state banks in the matter of branching.*

1. *The establishment of a* de novo *branch in Ogden, a city with four banks, is not "expressly authorized" under a Utah statute which prohibits* de novo *branches in any city of the size of Ogden "in which is located a bank or banks."*

Section 36(c)(1) of the National Bank Act, 12 U.S.C. § 36(c)(1), provides that national banks may establish "inside" branches:

> ". . . if such establishment and operation are at the time *expressly authorized* to State banks by the law of the State in question . . . ." (Emphasis supplied.)

The Utah Code prohibits *de novo* branching in cities of the "second class" where there is already a bank or banks in operation. With regard to these cities Utah Code Ann. § 7-3-6 (Supp. 1965) provides that:

> " . . . no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such a branch shall take over an existing bank."

Respondent submits that it is impossible to read the foregoing words and conclude, as the Comptroller does, that a *de novo* branch can be said to be "expressly authorized" in Ogden, a city with four banks, under a state statute which prohibits *de novo* branches in a city "in which is located a bank or banks."

Respondent further submits that the Comptroller's *contra* argument, at pp. 15-19 of his Brief, is fundamentally an erroneous play on words. The Comptroller argues that

the Utah statute quoted above must be read as authorizing state banks to establish branches in their home cities with the acquisition provision establishing the "method" by which this is accomplished. He then argues that the only state law restrictions made applicable to national banks are those stating "whether and where" branches may be established; and that the "method" provision in the Utah statute does not fall into the "whether and where" category.

The Comptroller errs in each step of this contrived argument.

First of all, the very premise of the Comptroller's argument is a misreading of the provision of the Utah statute prescribing the extent to which state banks may establish branches in cities, other than cities of the "first class," where there is already located a bank or banks. That statute does *not* permit unrestricted branch banking with a "method" established as that of "take-over." It provides that there shall be "no branch" established in a city where there is located an existing bank, unless it is the continued operation of the offices of an acquired bank by an acquiring bank. That is a flat prohibition against *de novo* branching, the issue here involved.[36]

Secondly, having erroneously construed the Utah statute as containing a "method" restriction, the Comptroller argues that "method" restrictions do not fall within the scope of the "whether and where" restrictions which, he asserts, are the only state law restrictions which Congress

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[36] The Comptroller's loose and broad construction of the Utah branch statute is *contra* to that given to it by the Utah Supreme Court. That court described the Utah branch statute as "restrictive," and has stated that "what it does not expressly permit, it prohibits." *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 236, 390 P.2d 592, 594 (1964). The court based this decision, in part, upon the fact that from 1911 through 1933 Utah absolutely prohibited all branch banking, and that the limited authority permitted in 1933 was under "restrictive conditions."

intended to apply to national banks. This argument, too, is a play on words. When a state prohibits *de novo* branching "in any city or town in which is located a bank or banks," that is just as much a clear cut statutory statement of "whether" branches can be established, and "where" branches can be established, as is a provision which states that there shall be no branching at all, or no branching outside of the city, or no branching outside of the home office county. All of these provisions specify a *location* at or in which branching is restricted.

Since it is clear that the Utah restriction here involved is a "whether and where" or "location" requirement applicable to national banks, as the Comptroller would use those terms, it is not necessary to consider the further argument, pressed with considerable vigor by the Petitioners, that "all" state branch restrictions are not applicable to national banks under Section 36(c)(1). However, because this argument indicates the depth to which Petitioners have misread Section 36(c), additional comment is warranted.

Petitioners base their contention that "all" state restrictions are not applicable to national banks under Section 36(c)(1) primarily upon the ground that Section 36(c)(2) contains the phrase "and subject to restrictions as to location imposed by the law of the State on State banks," whereas Section 36(c)(1) does not do so.

Petitioner, First National Bank, in No. 51 appears to argue that this phrase in Section 36(c)(2) demonstrates a congressional intent to have a more relaxed standard of competitive equality between national and state bank branches in Section 36(c)(1) than in 36(c)(2), although precisely why this is so is not made clear.[37] In any event, there is nothing in the legislative history of the McFadden

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[37] Br., p. 33 *et seq.* See, also, the opinion of the district court in No. 51 at Logan R. 42-43.

Act of 1927, enacting Section 36(c)(1), indicating any different standard of competitive equality than that required by the Banking Act of 1933, where Section 36(c)(1) was *re-enacted*, with the phrase "expressly authorized" substituted for the word "permitted," and where Section 36(c)(2) was added to the statute. Throughout the course of the debates on both statutes, considered at length at pp. 18-32, *supra*, the identical theme of competitive equality emerges, although as a result of various floor amendments to the Bratton amendment in 1933, a difference in language appears in the two subsections. *Both* subsections, as this Court stated in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. at 565, reflect the "policy of equalization" adopted by Congress in the National Bank Act.

Petitioners, First Security, and the Comptroller, take a somewhat different tack and argue that the "restrictions as to location" language in Section 36(c)(2) indicates a congressional intent that "all" restrictions are not applicable to Section 36(c), read as a whole, because to contend otherwise would be to give no significance to this phrase.[38]

As noted, at p. 29, *supra*, the "location" language was added to the Bratton amendment at the request of Senator Blaine, without discussion, during the floor debates on the bill ultimately enacted as the Banking Act of 1933. The intent of the language, it would appear to Respondent, was nothing more than to assure that the standards in state law to be applied to national banks were easily ascertainable objective standards, unambiguously designating where a branch could be established. Thus the usual standard in a state branch banking statute of a finding by a state Bank Supervisor of a "public need" for a branch involving, as it does, a judgment evaluation of facts, was obviously not the easily ascertainable objective type of restriction which Congress intended to be applicable to national banks. This is the sense of the language

[38] Comptroller's Br., p. 16; First Security's Br., p. 9.

in *First Nat'l Bank of Smithfield* v. *Saxon*, 352 F.2d 267 (4th Cir. 1965) cited by Petitioners,[39] and, indeed, with which Respondent is in accord. Respondent's construction of the "restrictions as to location" language is consistent with the theme of competitive equality pervading the legislative history of Section 36(c) and also preserves the duality of the dual banking system by assuring independent judgment on discretionary matters relating to national banks by the Comptroller alone.

In any event, the Utah branch statute here involved is precise and specifically states locations at which a branch may or may not be established. It provides that no *de novo* branches shall be established in a city, such as Ogden, in which there is located another bank or banks. Since a *de novo* branch is not "expressly authorized" in the city of Ogden with its four existing banks, the language of Section 36(c)(1) bars any authorization by the Comptroller to the Petitioner, First Security, to establish a branch in Ogden.

2. *The Comptroller's construction of Section 36 (c)(1) permitting national banks to branch in locations forbidden to state banks is irreconcilable with the principle of competitive equality which Congress sought to establish in Section 36(c), and which is imperative for the very survival of the dual banking system.*

At pp. 18-32, *supra*, Respondent has demonstrated the positive, unequivocal, and dominant expression of congressional intent in Section 36(c) of the National Bank Act to insure *competitive equality* between national and state banks in the matter of branching.

There can be no argument over the fact that the construction given to Section 36(c) by the Comptroller, re-

[39] The *Smithfield* case was principally concerned with the procedural question of whether the Comptroller is required to hold a hearing in a branch application. 352 F.2d 267, 268-71.

jected by both the courts of appeals for the District of Columbia and the Tenth Circuit in the cases below, would create *competitive inequality* between state and national banks in the matter of branching in every city in the State of Utah, other than a city of the "first class," of which there is now only one: Salt Lake City. National banks would be permitted to establish *de novo* branches at locations where there are existing banking offices, whereas state banks would not be permitted to do so. The only way in which state banks could establish a branch would be as a result of an acquisition in which they continued to operate the offices of an acquired bank. It is impossible to argue, and Respondent does not understand the Petitioners to so argue, that an unlimited right to establish *de novo* branches is competitively "equal" with a right to continue to operate the offices of an acquired bank as a branch.

Accordingly, the construction given to Section 36(c) by the Comptroller is utterly irreconcilable with congressional intent in Section 36(c) as demonstrated in the legislative history and cases deployed above. The purpose of the McFadden Act of 1927 was not to give national banks a *competitive advantage* over state banks in the matter of branching—the Comptroller's interpretation of Section 36(c)(1) in this case. It was to create *competitive equality.* And a similar purpose was evident in the legislative history of the Banking Act of 1933 in which Section 36(c)(1) was reenacted in connection with the passage of Section 36(c)(2).

The implications of this case go far beyond the state of Utah. The states of Connecticut, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Oregon, South Dakota, and Washington also have statutes which restrict *de novo* branch banking in certain locations dependent upon whether there are existing banking offices at such locations but, nevertheless, permit the continued operation of the office of an acquired

bank by an acquiring bank at such restricted locations. See Appendix B. These twelve states include 1,028 of the 8,732 commercial insured state banks of the country, or 12%, holding some 37% of the assets of all of the state banks in the country.[40]

The state banks in these twelve states simply could not stand competitive inequality in the matter of branching *vis a vis* national banks, any more than the national banks could stand competitive inequality in the matter of branching with state banks prior to 1927, which situation occasioned the passage of the McFadden Act. They would be forced to convert to the national banking system. It is, therefore, no exaggeration to say that adoption of the Comptroller's construction of Section 36(c)(1) would spell the end of the dual banking system in these states.

The only way in which the congressional intent to insure competitive equality between national and state banks in the matter of branching can be maintained in this case is by a construction of Section 36(c)(1) and of the Utah statute as prohibiting *de novo* branching by *both* national and state banks in the city of Ogden. Respondent urges this Court to affirm the courts of appeals for the District of Columbia and the Tenth Circuit below in so holding.

The remainder of this Brief will be directed to two arguments advanced by the Petitioners, not already covered in the Respondent's affirmative case, that Congress somehow intended competitive *inequality* in the matter of branching in the state of Utah and in the eleven other states with similar branch statutes.

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[40] The preponderance of assets in the 1,028 banks is due to the fact that large banks in such important states as New York and New Jersey are included in the listing. See FEDERAL DEPOSIT INSURANCE CORPORATION, ASSETS, LIABILITIES, AND CAPITAL ACCOUNTS, COMMERCIAL AND MUTUAL SAVINGS BANKS, REPORT OF CALL NO. 74 (December 31, 1965).

II. The Comptroller's "Anti-Competitive" Argument Is Not Responsive to the Issue In This Case, Misconstrues the Legislative History of Section 36(c), and Is Self-Contradictory.

The major thrust of the Comptroller's Brief, and, apparently, the point upon which his entire theory of the case revolves, may generically be termed an "anti-competitive" approach. After characterizing the Utah statute as one permitting unrestricted branch banking by "take-over" designed to "encourage" bank mergers leading to undesirable banking "concentration," he argues that the "take-over" provision should be ignored, insofar as national banks are concerned, because it (a) is against public policy as revealed in federal antitrust and bank merger statutes and (b) is contrary to legislative intent revealed in the arguments of those who unsuccessfully sought to prohibit all branch banking during the legislative debates leading up to the enactment of Section 36(c). With the "take-over" provision read out of the Utah statute, the Comptroller then concludes that national banks are permitted to establish *de novo* branches in locations prohibited by state law to state banks.

Respondent will now demonstrate that this unique construction of Section 36(c), first proposed by the incumbent Comptroller some thirty-six years after the passage of the McFadden Act of 1927, is irrelevant, erroneous, and self-contradictory.

1. *The Comptroller's argument is not directed to the issue in this case.* The Comptroller's quarrel with the Utah statute does not seem to be with the provision that prohibits *de novo* branching in a city in which there is a bank or banks already doing business—the issue in this case. He would apparently concede that such a provision, standing alone, would be binding upon the Comptroller.[41]

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[41] See the Comptroller's Petition for Writ of Certiorari, at p. 12, where he apparently concedes that state branch restrictions as to the

He could hardly do otherwise. The applicability of such a provision has received judicial confirmation, *e.g.*, *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958), and even the Comptroller would apparently hesitate to strike down a branch statute of this general type, presently in effect in seventeen states,[42] upon an "anti-competitive" argument contrived some thirty-six years after the applicable provision of law was enacted.

The Comptroller's quarrel seems to be with joining a provision limiting *de novo* branches in a location with existing banks, with a provision permitting the retention of the office of an acquired bank by an acquiring bank as a branch. His challenge is to this "take-over" provision, as he terms it, in effect in Utah and eleven other states, and he argues that such a provision is "anti-competitive" and therefore should be read out of the statute insofar as national banks are concerned.

But, where does such an argument leave the Comptroller?

He has missed the whole point of *this* case. The issue *here* is whether the Comptroller may authorize a national bank to establish a *de novo* branch in a city in which there is a bank or banks doing business when state banks, by state law, are prohibited from doing so. There is no issue here involving the "take-over" of a bank and its conversion to a branch. Thus, even if the "take-over" provision were read out of the statute, as far as national banks

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number of branches in any location are applicable to national banks. In any event, the point is not argued in his Brief to this Court.

[42] Alabama, Connecticut, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oregon, South Dakota, Utah, and Washington, restrict *de novo* branching in territories (variously defined) where there is a bank or banks.

were concerned, the Comptroller would still be left with the remainder of the Utah statute which prohibits *de novo* branching under the circumstances here present. He *still* could not authorize the requested branch of First Security.

Accordingly, to a significant extent the entire discussion in the Comptroller's Brief hypothecating on the evils of bank concentration resulting from the "take-over" provision is irrelevant. But even that irrelevant argument is wrong, as will now be demonstrated.

The Comptroller considers the establishment of a branch by "take-over" as if it were an *independent* branch authorization, as is the case of the authorization of a *de novo* branch. It is not. It is a *resultant* from another transaction, namely, an *acquisition* of one bank by another, which is itself the subject of independent scrutiny. The Comptroller errs when he suggests that there is no statutory provision which would preclude a single bank from coming to dominate the entire banking industry of Utah. (Comptroller's Br., p. 36).

There are several. The Sherman Act of 1890, 15 U.S.C. §§ 1-7, is applicable to banks, and only recently this Court sustained an action by the United States to block a consolidation of two banks in Lexington, Kentucky, as constituting a combination in restraint of trade and commerce in violation of Section 1 of the Sherman Act. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964). Further, as this Court also recently held in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), Section 7 of the Clayton Act, 15 U.S.C. § 18, was applicable to stock acquisition of banks from 1914 through 1950 at which time it was extended by the Celler-Kefauver Anti-Merger Act to include bank mergers.[43] In addi-

[43] The foregoing transaction would cover all practical forms of a "take-over" of a bank and its conversion to a branch, as contemplated in the Utah statute. As this Court has noted, an assets-ac-

tion, the Bank Merger Act of 1960, 12 U.S.C. § 1828(c) (1964), as amended by P.L. 89-356, Feb. 21, 1966, provides for an elaborate review of all bank acquisitions involving insured banks.[44] If "the acquiring, assuming, or resulting bank" is a state member bank, approval is required by the Federal Reserve Board; if a state nonmember bank, by the FDIC; and if a national bank, by the Comptroller. 12 U.S.C. § 1828(c) (2), as amended by P.L. 89-356, Feb. 21, 1966. Standards for approval are set forth, including consideration of "competitive factors," and each agency is directed to receive reports from the Attorney General and the other two banking agencies on this standard. By the 1966 amendment, all bank mergers are prohibited whose effect in any section of the country may be to substantially lessen competition unless its adverse competitive effects are "clearly outweighed" by considerations of public need and convenience. 12 U.S.C. §§ 1828(c) (4)-(7), as amended by P.L. 89-356, Feb. 21, 1966.

Thus, the discussion of the dangers of "banking concentration" deployed at such length in the Comptroller's Brief is of doubtful relevancy. Congress has provided against such dangers by legislation applicable to bank acquisition to the extent it deemed necessary and desirable. Only after an acquisition has "cleared" this review, both federal and state,[45] does the question of the disposition of the

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quisition, excepted from Section 7 of the Clayton Act as far as banks are concerned because they are not subject to the jurisdiction of the Federal Trade Commission, "would not seem to be a fully effective method of corporate acquisition." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 344 n. 22 (1963).

[44] More than 95% of all banks are insured by the Federal Deposit Insurance Corporation. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 327 (1963).

[45] Utah Code Ann. § 7-6-2, also requires approval of bank mergers. Section 7-6-4C(4) requires a finding that the merger is not "contrary to the public interest." Section 7-6-4C(1) requires the

office of the acquired bank even arise. Some states require the office to be closed if branches are otherwise forbidden. Some states, like Utah, permit the continued operation of the branch.[46]

The point, however, is that the Comptroller's entire argument relating to the disposition of a branch following a bank acquisition has nothing to do with the central issue in this case. This Court is here concerned with the question of whether the Comptroller may authorize *de novo* branches at a location prohibited to state banks under state law.

2. *The Comptroller has misconstrued the legislative history of Section 36(c).* Conceding, *arguendo*, the relevance of the Comptroller's argument, the Comptroller further errs in that he has misconstrued the legislative history of Section 36(c).

The argument of the Comptroller is based upon the assumption that the legislative history of Section 36(c) revolved *exclusively* around a debate between proponents of branch banking, seeking to extend what they considered to be the merits of such a system, and the opponents of branch banking, seeking to block what they foresaw as "banking concentration" resulting from the expansion of city banks into rural areas. From this debate the Comptroller argues that Section 36(c) was basically a "compromise" involving a "concession" of the proponents of

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resulting state bank to meet all the requirements of state law as to the formation of a new state bank, and Section 7-1-26 includes among those requirements a finding that the ". . . location or field of operation of the proposed business shall [not] be in such close proximity to an established business that the established business might be unreasonably interfered with . . . ."

[46] The retention of the office of an acquired bank by an acquiring national bank is governed by the provisions of Section 36(b) of the National Bank Act which, like Section 36(c), is geared to state branch law. 12 U.S.C. § 36(b) (1964).

branch banking to the opponents of branching, from which he concludes that a "take-over" provision, such as the one in the Utah statute, allegedly associated "in the minds of the opponents" of branching with "banking concentration" could never have been intended as a state restriction applicable to national banks.

The Comptroller is clearly in error with regard to his interpretation of the legislative history of the McFadden Act of 1927, in which the provisions of Section 36(c)(1) —the applicable statutory provision in this case—were enacted. The legislative history of the McFadden Act did not turn upon the issue of whether branch banking should be extended to communities where that sort of banking could be useful. It turned on the issue of *competitive equality* between national and state banks in the matter of branching —the very principle which the Comptroller would ignore here. Thus, the concern expressed by the Comptroller of the Currency both in his Annual Reports prior to the McFadden Act of 1927 and during hearings before Congress, was *not* with the desirability of inside or outside branching *per se*. See pp. 18, 19, *supra*. It was with the necessity of giving national banks "the opportunity to meet the competition of State banks in intra-city banking" which he considered necessary for the very survival of the national banking system. See p. 19, *supra*. Accordingly, he proposed legislation which would give national banks the right to branch where state banks had such a right, *not* irrespective of state law.

The mode which Congress adopted to accomplish this result was (1) to grant national banks the right to establish branches in their home-office towns, where such branches were permitted state banks by state law, and (2) to restrict branching by state member banks of the Federal Reserve System (then, as now, the largest of the

state banks) to such inside branches.[47] Thus, as Representative McFadden, the sponsor of the bill stated:

> "*competitive equality* has been established among all member banks of the Federal reserve system." 68 Cong. Rec. 5815 (1927) (Emphasis supplied.)

Accordingly, the Comptroller's reading of the legislative history of the McFadden Act of 1927 as a "compromise" between "proponents" and "opponents" of branch banking, embracing an intent to exclude state branch restrictions associated in the "minds of the opponents" with the evils of branch banking, is an unsupportable theory.

Competitive equality was also the dominant theme of the Banking Act of 1933 relating to outside branches. It is true that there the proponents of branch banking urged unlimited branch banking for national banks without regard to state law as a matter of policy, but they were defeated as much on the grounds that any such action would destroy competitive equality between national and state banks, as they were by the vigor with which the opponents of branch banking spelled out the dangers which they attached thereto. See pp. 26-28, *supra*. The bill which finally passed reaffirmed the principle of competitive equality, as Senator Glass, the author of the Banking Act of 1933, stated in his summation on the floor:

> "We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of *competitive equality* with

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[47] Indeed, Congress could do no more. Its authority over state member banks stemmed entirely from the fact that they voluntarily accepted federal regulation as the "price" for the benefits of membership in the Federal Reserve System. See *Westfall* v. *United States*, 274 U.S. 256, 258-9 (1927). It is doubtful whether Congress would have had the constitutional authority to restrict branching of *nonmember* state banks. Of course the Banking Act of 1933 placed national banks on a plane of competitive equality with *all* state banks by removing any restriction on branching in accordance with its policy of permitting national banks to branch anywhere to the extent permitted state banks under state law.

> State banks in the respective States we have been unable to understand." 77 Cong. Rec. 3726 (1933). (Emphasis supplied.)

Thus, the Comptroller's argument as to the type of state branch restrictions which Congress intended to be applicable to national banks, based upon a surmise of the type of restrictions which the opponents of branching had in mind when they "compromised" with the proponents of branching, is not supportable in the light of the one unequivocal and dominant theme of the legislative debates: competitive equality between state and national banks in the matter of branching. It is that principle which is patently violated by the construction which the Comptroller has given to Section 36(c)(1) of the Act.

Finally, there is one other salient point in the legislative history of Section 36(c) which the Comptroller has overlooked and which is dispositive of the argument he advances.

At the time the McFadden Act was passed, there was at least one state which permitted the retention of the office of an acquired bank by an acquiring bank in locations where branching was otherwise prohibited.[48] At the time of the Banking Act of 1933, at which time Section 36(c)(1) was amended and reenacted, at least seven other states had such statutes.[49] Congress was certainly aware

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[48] MASS. GEN. LAWS ch. 172, §§ 44, 45, 46, as amended by Massachusetts Act 1922, ch. 396, p. 419 (numerical restriction on branches in a city inapplicable to branching by merger).

[49] Five of these statutes, including that of Utah, allowed branching by merger in communities in which branching was otherwise permitted only if there were no operating banks: Connecticut Public Acts 1933, ch. 274, § 1; Idaho Laws 1933, ch. 71, § 1, p. 116; Maine Laws 1933, ch. 34, pp. 184-5; Oregon Laws 1933, ch. 150, § 3, p. 172; Utah Laws 1933, ch. 6, § 1, p. 8. (All of these statutes had been passed before the enactment of the Banking Act of 1933 on June 16, 1933.) Other statutes allowed branching by merger within larger areas: Virginia Laws 1928, ch. 507, § 13, p. 134; Washington Laws 1933, ch. 42, § 5, pp. 228-9.

of state branch laws and, indeed, they were recited at various times during the debates.[50] Certainly if Congress had wished to carve out restrictions contained in statutes of this type from the principle of competitive equality established in Section 36(c) it could have done so. The Comptroller may not do so by a contrived theory drawn from the legislative debates some thirty-six years after Section 36(c)(1) was enacted.

3. *The Comptroller's "public policy" argument is self contradictory.* The Comptroller has argued that the "take-over" provision in the Utah statute is contrary to "public policy." Respondent will now demonstrate that it is the *Comptroller's construction* of Section 36(c)(1), *not* the Utah branch statute, which is contrary to public policy.

Petitioner, First Security, is by far the largest bank in Utah, with 45 branches located in 34 cities, constituting 33% of *all* of the banking offices (head offices and branches) in Utah.[51] It has combined resources in excess of $360 million (Saxon R. 10), many times larger than Respondent,[52] and, indeed, substantially more than Walker Bank & Trust Co., the second largest bank in the state with resources in excess of $240 million and 13 branches. (Br. of Pet. First Nat'l Bank of Logan in No. 51, p. 15). The Comptroller's construction of Section 36(c)(1) of the National Bank Act will permit First Security to establish *de novo* branches in some 37 cities all over the state of Utah where there are presently located state banks which

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[50] *E.g.*, 66 Cong. Rec. 924 (1924); 66 Cong. Rec. 1577 (1925); 67 Cong. Rec. 2834 (1926).

[51] FEDERAL DEPOSIT INSURANCE CORPORATION, OPERATING BANKS INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION (January 1, 1966; Jan.-July, 1966 Supps.). There are presently 136 insured head offices and branches located in Utah. *Ibid.*

[52] Saxon R. 15. At the time of Petitioner's complaint (Saxon R. 10), Respondent had resources amounting to $57 million. Commercial Security Bank Fiscal 1963 Statement.

would be forbidden by state law from even meeting the competition of this giant bank by establishing their own *de novo* branches.[53] At this point Respondent simply incorporates by reference most of the Comptroller's Brief dealing with the evils of banking concentration to demonstrate that his construction of Section 36(c) could not be more disastrous to public policy as reflected in a healthy, competitive, banking environment in the State of Utah.

The Comptroller further argues that the Utah statute "encourages" mergers contrary to public policy. But there is *nothing* which the Comptroller could possibly do to encourage *more* bank mergers than to construe Section 36(c)(1) as he has done here. If national banks are permitted to establish *de novo* branches in areas where state banks are forbidden such branches because of existing banks, then state banks and state authorities would tend to meet the competition from *de novo* branching by national banks by freely permitting state banks to acquire banks in order to convert them into branches. Then, and only then, would the Utah type statute "encourage" bank mergers—as a *direct* result of the Comptroller's construction of Section 36(c)(1).

As an alternative to the foregoing, Utah and the eleven other states with Utah type statutes could repeal the provision which permits an acquired bank to be retained as a branch by an acquiring bank. Such a repeal would then leave the provision against any branch banking in locations where there is an existing bank applicable to both national and state banks, thus restoring competitive equality. But such repeal is not in accord with public policy. The inability to continue to operate the office of an acquired bank by an acquiring bank would tend to be a deterrent to any bank acquisition.[54] *All* bank acqui-

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[53] Note 51, *supra*.

[54] Over 90% of all mergers take place in states that permit branching. The number of mergers in unit banking states is in-

sitions are not contrary to the public interest as even the Comptroller himself would agree judging from the large number of bank mergers which he has approved.[55] An acquisition can promote the public interest in instances of the acquisition of a failing bank, or of a bank without a continuity of management, or of a bank unable to secure needed increased resources, to name just a few of the meritorious reasons for a merger.[56] The Comptroller's construction of Section 36(c)(1), by forcing states to repeal provisions permitting an acquired bank to be retained as a branch by an acquiring bank, would block healthy mergers. It is obviously far more in the public interest, to permit, as at present, retention of the offices of an acquired bank as a branch, following an acquisition, and to rely upon the state and federal banking agencies, and upon the Anti-Trust Division of the Justice Department, to block any merger or acquisition which threatens to lead to banking concentration.

The remaining alternative available to Utah, and the eleven other states with Utah type statutes, faced with the Comptroller's construction of Section 36(c)(1) would be to simply give up, and permit statewide branch bank-

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significant. See Shull and Horvitz, *Branch Banking and the Structure of Competition*, 1 NATIONAL BANKING REVIEW 301-343 (Mar. 1964). Messrs. Shull and Horvitz are Senior Economists in the office of the Comptroller of the Currency.

[55] Under the Bank Merger Act of 1960, the Comptroller is required to publish his merger decisions, which he does in his Annual Reports. 100 COMPT. CURRENCY ANN. REP. v-vii (1962), lists 107 approvals and 7 disapprovals; 101 COMPT. CURRENCY ANN. REP. 64-67 (1963), lists 91 approvals and 2 disapprovals; and 102 COMPT. CURRENCY ANN. REP. 58-61 (1964), lists 90 approvals and no disapprovals.

[56] See, *e.g.*, 100 COMPT. CURRENCY ANN. REP. 23-158 (1962); 101 COMPT. CURRENCY ANN. REP. 68-188 (1963); 102 COMPT. CURRENCY ANN REP. 62-171 (1964), wherein the Comptroller indicates the public advantages flowing from each of these mergers.

ing. Such authority, available to both state and national banks, would restore competitive equality. But forcing states to change their laws would be patently contrary to the public policy expressed by Congress in Section 36 (c). There Congress made it clear that it did *not* intend to force states to follow federal law in the matter of branching.

During the legislative history of the McFadden Act of 1927 the Senate Banking Committee rejected a House proposal to permit branching only in those states *then* permitting branching. As noted at p. 22, *supra*, the Senate Banking Committee construed the House proposal as "pressure" on the states not to amend their laws so as to permit expanded branching authority, which the Senate Banking Committee considered as "an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." And the Glass bill, ultimately enacted as the Banking Act of 1933, would have initially authorized statewide branch banking for national banks regardless of state law. See pp. 24-25, *supra*. Senator Glass candidly predicted "that if the Congress enacts this bill into law, there is not a State in the Union that will not promptly authorize its State banks to get on an equality of competition with the national banks by adopting the state-wide branch banking system." 75 Cong. Rec. 9892 (1932). As has been noted at pp. 25-32, *supra*, however, this proposal was *defeated* in favor of the principle of *competitive equality* between national and state banks in the matter of branching.

Finally, even if the Comptroller's construction of Section 36(c)(1) were successful in forcing Utah to change its law to permit statewide, rather than limited, branching, the net result would appear to contradict the goal for which the Comptroller apparently contends. The Comptroller ends his Brief (Comptroller's Br., p. 43 n.28) with reference to a table in his Appendix C demonstrat-

ing that Utah has fewer unit banks per capita than the national average, which he characterizes as the "anti-competitive" result of the Utah bank statute. But if Utah moved to statewide branch banking, would the change result in more unit banks which, presumably, the Comptroller would consider a desirable "competitive" result? The conclusions drawn by the authors of the study upon which he relies would demonstrate that precisely the *contrary* result would occur. They conclude:

> "There are currently more banks in states that permit limited branching than in states that permit statewide branching; and there are still more banks in states that do not permit branching at all." [57]

This is an obvious conclusion. If banking needs can be met by branching, fewer unit banks can be anticipated. Therefore, the comparison of the unit banks of Utah, a state with limited branch banking, with unit banks in the United States, including states with statewide branch banking, as the Comptroller has done in Appendix C of his Brief, simply reflects the relationship of the number of unit banks with the authority to branch, as Messrs. Shull and Horvitz have pointed out. The comparison does *not* reflect an "anti-competitive" or "competitive" effect.

The issue of *de novo* branching can be argued either way from a competitive standpoint. Senator Glass, a proponent of branching, considered unit bankers in small cities "monopolists" in resisting branching competition. 75 Cong. Rec. 9892 (1932). Other architects of Section 36(c) of the National Bank Act felt that the large city banks would "monopolize" banking in smaller cities if permitted unrestricted branching. Congress solved the problem within the framework of "competitive equality" between national and state banks in the matter of branch-

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[57] Shull & Horvitz, *Branch Banking and the Structure of Competition*, 1 NATIONAL BANKING REVIEW, 301, 315 (Mar. 1964) (Footnote omitted.)

ing by acceding to state laws reflecting variant economies and philosophies. The imposition of economic theory relating to bank mergers into *de novo* branching, with its resultant disruption of "competitive equality," leads to utterly contradictory and unacceptable results.

III. No Weight Should Be Ascribed to the Incumbent Comptroller's Construction of Law Made Thirty-Six Years After the Enactment of Section 36(c)(1) and Contrary to All Prior Administrative Practice.

Petitioner, First Security, argues that "the position taken by the Comptroller herein should be upheld unless clearly unreasonable." (First Security Br., p. 23 *et seq.*).

Whatever may be the salutary nature of the principle of ascribing weight to interpretative decisions of administrative and executive agencies, such a principle is clearly not applicable here.

Respondent submits that the construction made by the Comptroller in this case is absolutely unique. No similar administrative construction of the Act has been cited throughout the entire course of this litigation, and Respondent is unaware of any such interpretation made by *any* predecessor of the incumbent Comptroller.[58]

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[58] Decisions of the Comptroller in this regard are not published. Respondent calls the attention of this Court, however, to testimony before Congress of the prior Comptroller, Mr. Gidney, which would appear to run contrary to the construction given the statute by the present Comptroller. In urging an amendment to Section 36(b) of the National Bank Act relating to the retention of branches of a resulting national bank after merger, Comptroller Gidney was careful to point out that this proposed amendment did not conflict with "the purpose of existing law . . . to prevent a bank from acquiring branches where they could not be legally established under State law, by taking over other banks," (*Hearings before the Senate Committee on Banking and Currency (Study of Banking Laws)*, 84th Cong., 2d Sess. 27 (1956)), and "would involve no possibility of permitting avoidance of State branch banking laws or giving national banks competitive advantage over State banks in the

Section 36(c) was first enacted in the McFadden Act of 1927. In other words, *for over three decades*, from the McFadden Act of 1927 through the third year of the administration of the incumbent Comptroller (1963), no Comptroller had *ever* construed Section 36(c)(1) in a manner to disrupt competitive equality in the matter of branching between national and state banks in states with the Utah type statute. Accordingly, the unique construction made by the incumbent Comptroller in this case, some thirty-six years after the passage of the McFadden Act, based upon a contrived and strained construction of arguments advanced during the debates, and contrary to administrative practice of all of his predecessors, is entitled to no weight whatever.

Furthermore, the Comptroller's interpretation in this case is not based upon any factors reflecting his "more specialized experience" and "broader investigations" which could give some weight to his opinion. *Cf., Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944). It is an interpretation involving statutory construction, upon which the courts are undoubtedly far more expert than is the Comptroller. Certainly, this has been the attitude of the lower courts. The incumbent Comptroller is a vigorous advocate of branch banking and has frequently stated his restiveness with being bound by state branching laws.[59] His unique and liberal constructions of Section 36(c) and of state branching laws, which have generated a substantial

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matter of branching." *Hearings before the House Committee on Banking and Currency (Financial Institutions Act of 1957)*, 85th Cong., 1st Sess. 160 (1957).

[59] E.g. "The branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual States find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers and the Dual Banking System*, 101 COMPT. CURRENCY ANN. REP. 316, 318 (1963).

amount of litigation during the past five years,[60] have been struck down time and again.[61] Respondent asks this Court to do so again here.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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[60] Prior to 1958 there had never been any litigation by a state bank challenging a branch decision of the Comptroller of the Currency. Since that time, there has been a flood of litigation, and, as will be noted from the citations at note 6, pp. 8-9, *supra*, all but two of these cases have arisen during the administration of the incumbent Comptroller (post 1959).

[61] See cases at pp. 35-36, *supra*. See also *Bank of New Orleans & Trust Co.* v. *Saxon*, 211 F. Supp. 576, 577 (D.D.C. 1962), *aff'd sub nom. Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290, 304 (D.C. Cir. 1963) (Comptroller enjoined from knowingly permitting unlawful de facto branch, in violation of 12 U.S.C. § 36, which he had approved "because he considered the end desirable"), *rev'd on procedural grounds*, 379 U.S. 411 (1965).

APPENDIX A

Summary of Branch Banking Statutes of the Fifty States

1. *States Permitting Unlimited Branch Banking*

Alaska

ALASKA STAT. § 06.05.415 (1962)

Arizona

ARIZONA REV. STAT. § 6-223 (1956)

California

CAL. FINANCIAL CODE § 500

Delaware

DEL. CODE ANN. tit. 5, § 770 (Supp. 1964)

Hawaii

Hawaii Sess. Laws 1965, Act No. 201, pp. 317-18, amending HAWAII REV. LAWS § 178-39 (1955)

Idaho

IDAHO CODE ANN. § 26-1001 (Supp. 1965)

Maryland

MD. CODE ANN. art. 11, § 65 (1957)

Nevada

NEV. REV. STAT. § 660.010 (1963)

North Carolina

N.C. GEN. STAT. § 53-62 (1965)

Rhode Island

R.I. GEN. LAWS § 19-1-13 (1956)

South Carolina

S. C. CODE § 8-57 (1962)

Vermont

VT. STAT. ANN. tit. 8, §§ 501 to 505 (1958), § 502a (Supp. 1965)

2. *States Permitting Restrictive Branch Banking*

Alabama

ALA. CODE tit. 5, §§ 125, 125(1) (1960)

Connecticut

CONN. GEN. STAT. § 36-59 (1962)

Georgia

GA. CODE ANN. § 13-203.1 (Supp. 1965)

Indiana

IND. STAT. ANN. § 18-1707 (Supp. 1963)

Kentucky

KY. REV. STAT. § 287.180 (1962), as amended by Ky. Acts 1966, ch. 11, § 2, p. 112-14

Louisiana

LA. REV. STAT. ANN. §§ 6:54 to 6:56, 6:244 (1950)

Maine

ME. REV. STAT. ANN. tit. 9, § 1003 (Supp. 1965)

Massachusetts

MASS. GEN. LAWS ch. 172, § 11 (Supp. 1965)

Michigan

MICH. STAT. ANN. § 23.762 (1957), § 23.762(1) (Supp. 1965)

Mississippi

MISS. STAT. ANN. §§ 5226 to 5236 (1956), as amended, May 16, 1966

New Hampshire

N.H. REV. STAT. ANN. § 384-B:2 (Supp. 1965)

New Jersey

N.J. STAT. ANN. § 17:9A-19 (Supp. 1965)

New Mexico
N.M. STAT. ANN. §§ 48-2-16 to 48-2-19 (Supp. 1965)

New York
N.Y. BANKING LAW § 105

Ohio
OHIO REV. CODE ANN. § 1103.09 (1953)

Oregon
ORE. REV. STAT. § 714.050 (1965)

Pennsylvania
PA. STAT. ANN. tit. 7, § 904 (Supp. 1965)

South Dakota
S.D. CODE § 6.0402 (1960)

Tennessee
TENN. CODE ANN. § 45-211 (1964)

Utah
UTAH CODE ANN. § 7-3-6 (Supp. 1965)

Virginia
VA. CODE §§ 6-26 to 6-29.1 (Supp. 1964) (Re-enacted as §§ 6.1-26 to 6.1-29.1, Acts 1966, ch. 584)

Washington
WASH. REV. CODE § 30.40.020 (1961)

3. *States Prohibiting All Branch Banking*

Arkansas *
ARK. STAT. §§ 67-205, 67-340 to 67-352 (1966)

Colorado
COLO. REV. STAT. § 14-3-1 (1963)

Florida *
FLA. STAT. § 659.06 (1965)

Illinois *

ILL. REV. STAT. ch. 16½, §§ 105, 106 (1965)

Iowa *

IOWA CODE § 528.51 (1962)

Kansas *

KAN. STAT. ANN. § 9-111 (Supp. 1965)

Minnesota *

MINN. STAT. ANN. § 48-34 (1946)

Missouri *

MO. STAT. ANN. §§ 362.105, 362.107 (Supp. 1965)

Montana *

MONT. REV. CODE § 5-1028 (Supp. 1965)

Nebraska *

NEB. REV. STAT. § 8-157 (Supp. 1963)

North Dakota *

N.D. CODE §§ 6-03-15 to 6-03-19 (1959), § 6-03-14 (Supp. 1965)

Oklahoma *

OKLA. STAT. tit. 6, §§ 501, 2061 (Supp. 1965)

Texas *

TEX. CIV. STAT. ANN. art. 342-903 (Supp. 1965)

West Virginia

W.VA. CODE ANN. § 3131 (1961)

Wisconsin *

WIS. STAT. ANN. § 221.04 (1957)

4. *States With No Legislation Authorizing Branch Banking*

Wyoming

* These states permit certain offices with limited powers only.

APPENDIX B

Summary of State Laws Which, Like the Utah Statute Involved in This Case:

(1) Restrict De Novo *Branch Banking In Certain Locations Dependent Upon Whether There Are Existing Banking Offices At Such Locations, But*

(2) Nevertheless Permit State Banks To Acquire A Branch By Merger At Such Restricted Locations

Connecticut
CONN. GEN. STAT. § 36-59 (1962)

Kentucky
KY. REV. STAT. § 287.180 (1962), as amended by Ky. Acts 1966, ch. 11, § 2, pp. 112-14

Maine
ME. REV. STAT. ANN. tit. 9, § 1003 (Supp. 1965)

Massachusetts
MASS. GEN. LAWS ANN. ch. 172, § 11 (Supp. 1965)

Mississippi *
MISS. CODE ANN. §§ 5226 to 5236 (1956), as amended, May 16, 1966

New Hampshire
N.H. REV. STAT. ANN. § 384-B:2 (Supp. 1965)

New Jersey
N.J. STAT. ANN. § 17:9A-19 (Supp. 1965)

New York
N.Y. BANKING LAW § 105

Oregon
ORE. REV. STAT. § 714.050 (1965)

South Dakota
S.D. CODE § 6.0402 (Supp. 1960)

Washington
WASH. REV. CODE ANN. § 30.40.020 (1961)

* Applies to branch offices; branch banks are governed by § 5229.

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Nos. 73, 88

Supreme Court of the United States

October Term, 1966

FIRST SECURITY BANK OF UTAH, N. A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent,

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF ON BEHALF OF VIRGINIA BANKERS ASSOCIATION AMICUS CURIAE

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Supreme Court of the United States

October Term, 1966

No. 73

FIRST SECURITY BANK OF UTAH, N. A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent,

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF VIRGINIA BANKERS ASSOCIATION AMICUS CURIAE

PRELIMINARY STATEMENT

Virginia Bankers Association is filing this brief as amicus curiae in accordance with Rule 42 of the Revised Rules of the Supreme Court of the United States. It is to be noted that this brief is filed in Nos. 73 and 88 only. The failure to file a brief in No. 51, which involves exactly the same

issue, is due to the refusal of counsel for First National Bank of Logan, Logan, Utah, petitioner in that case, to consent to such filing.

THE STATUTES INVOLVED

The federal statute involved is Section 36(c) of Title 12 of the United States Code, as amended, the pertinent provisions of which read as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

The state statute involved is Section 7-3-6 of the Utah Code Annotated, 1953, as amended, the pertinent provisions of which read as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the

purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

THE INTEREST OF VIRGINIA BANKERS ASSOCIATION

Virginia Bankers Association is a non-stock corporation, not organized for profit, chartered under the laws of the Commonwealth of Virginia. Its active membership consists of both state and national banks and branches of each. As of August 31, 1966, the Association listed as active members 136 state banks, 114 national banks and branches of each totaling 474.[1]

The purposes of the Association are generally to promote ethical, sound and efficient banking practices for the welfare of banks and the banking public in Virginia.

Since its founding in 1893, the Association, reflecting the views of its state and national bank members, has favored and supported the concept of a strong dual banking system. It has felt that the preservation of such a system is possible only through laws which require the maintenance of a condition of competitive equality between state and national banks and which accomplish this objective by making both state and national banks subject to state statutes governing banking practices such as branching.

The Virginia Bankers Association is convinced that acceptance of the construction which the petitioners in the cases before this Court would give to Section 36(c) of Title 12, United States Code, would effectively destroy the dual banking system in Virginia or, in the alternative, force Virginia to change her branch banking laws in a manner that both the Commonwealth and the Association would consider not only objectionable but contrary to the best interests of banking, and the economy, in Virginia.

---

[1] Records of Virginia Bankers Association.

The Association is keenly interested in seeing the continuance of an interpretation of Section 36(c) that would subject national, as well as state, banks to such conditions and restrictions of state statutes governing branch banking as shall be necessary to maintain competitive equality between them.

SUMMARY OF ARGUMENT

The Virginia Bankers Association concurs with the views expressed in the summary of argument contained in the brief on behalf of the Commonwealth of Virginia, amicus curiae, filed with this Court in Nos. 51, 73, and 88, and adopts the said summary of argument as its own.

ARGUMENT

The Virginia Bankers Association concurs with the views expressed in the argument contained in the brief on behalf of the Commonwealth of Virginia, amicus curiae, filed with this Court in Nos. 51, 73, and 88, and adopts the said argument as its own.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Henry T. Wickham, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Virginia Bankers Association, as *amicus curiae,* in the above captioned matter, hereby certify that copies of the Brief on Behalf of Virginia Bankers Association, *Amicus Curiae,* have been served upon each of the counsel of record for the parties herein by depositing the same in the United States Post Office, with first class or air mail postage prepaid, this 21st day of September, 1966, pursuant to the provisions of Rules 33 of the Rules of the Supreme Court of the United States as follows: John J. Wilson, Esq., and Charles J. Steele, Esq., 815 Fifteenth Street, N. W., Washington, D. C., 20005, counsel for petitioner, First Security Bank of Utah, N. A.; James F. Bell, Esq., and Brian C. Elmer, Esq., 1001 Connecticut Avenue, N. W., Washington, D. C., 20036, counsel for respondent, Commercial Security Bank; and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, counsel for petitioner, James J. Saxon, Comptroller of the Currency.

HENRY T. WICKHAM

No. 73

OCT 11 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner*

v.

COMMERCIAL SECURITY BANK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF PETITIONER, FIRST SECURITY BANK OF UTAH, N.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 73

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner*

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COMMERCIAL SECURITY BANK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF PETITIONER, FIRST SECURITY BANK OF UTAH, N.A.

It is beyond peradventure that the various state laws governing state banks differ not only from one another but also from the National Bank Act. All parties to this proceeding must agree, therefore, that there is no over-all "policy of equalization", despite the frequent use of that phrase by Respondent. Had Congress wished to establish a "policy of equalization",

it could have done so simply by enacting a statute making national banks subject to the State laws governing State banks in the particular State in which the national bank was located. Congress, however, did not do this. National banks are subject to the laws of the United States, and are not subject to the laws of the State, except in so far as Congress has expressly provided. *Van Reed* v. *People's National Bank,* 198 U.S. 554, 557 (1905); *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558-559 (1963).

Respondent christens the area dealing with branch banking "a basic competitive area", and states that in *this* area, there must be exact equality between state and national banks because of its "basicness". Many pages of Respondent's brief are devoted to this thesis, and much legislative history is quoted. The unquestionable fact remains, however, that in this case, unless Congress expressly provided that the laws of the State of Utah dealing with the method of establishing a branch of a State bank shall also control the method whereby national banks may establish a branch, the action of the Comptroller in authorizing a branch to Petitioner was proper, and the judgment of the Court below should be reversed.

The words of 12 U.S.C. 36(c)(1), the governing statute, are clear and unambiguous. That Section provides that a national bank may, with the Comptroller's approval, establish a branch within the limits of the city in which it is situated, if such establishment is at the time expressly authorized to State banks by the laws of the State in question. As Judge Christenson found in *Walker Bank & Trust Co.* v. *James J. Saxon and the First National Bank of Logan,* 234 F. Supp. 74, 77,

the other case which accompanies the instant one to this Court, branches *are* expressly authorized to State banks by Utah law under the circumstances of the present case. No one really takes issue with the fact that both Respondent, a State bank, and Petitioner, a national bank, are authorized to establish branches in Ogden, Utah. The crux of the case is whether Petitioner is bound by the condition of "acquisition" placed upon State banks by a State statute. No federal statute states that this State limitation on the method of establishing a branch shall apply to national banks, and no one even suggests that other State conditions, such as those dealing with capitalization and other requirements, apply to national banks,[1] but Respondent terms the matter of branches, "a basic competitive area", and states, therefore and *ipse dixit,* that the Utah limitation on method must be read into federal law.

To support its position, Respondent begins by taking the phrase, "policy of equalization", from the case of *Lewis* v. *Fidelity & Deposit Co.,* 292 U.S. 559 (1934) (cited in Respondent's brief on pages 8, 14, 17, 33, 34 and 40) and attempting to establish it as a concept of law controlling in this case. The *Lewis* case involved a federal statute enacted in 1930, dealing with the security which could be given for public monies deposited in banks and not pertinent to the instant case. In fact, the 1930 Act provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited *of the same kind as is authorized by the law of the State in which such association is located* in the case of

[1] See opinion of Judge Christenson at 234 F. Supp. 78, f.n. 8.

other banking institutions in the State." (Emphasis added)

The language emphasized is of the broad type *not present* in the instant case. When, in some *dicta* in the *Lewis* case, the Court speaks of a "policy of equalization" in connection with federal bank branching, it should be remembered that the "equalization" extends no farther than Congress provided, and Congress nowhere provided that it should extend to the point where a State can impose limitations of method on the way a national bank may establish a branch.

In its brief, Respondent also turns to *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, *aff'd per curiam,* 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960). In addition to the fact that the *Gidney* case involved a different issue completely, and a different section of the statute, it also appears that the arguments presented in the istant case were not presented to the Court in *Gidney.* This is understandable since the overriding issue in the *Gidney* case was the question of what constituted a "village", and the question of the limitation of method of establishing a branch of a national bank was not even before the Court.

Respondent also relies for support on the recent case of *Jackson* v. *First Nat'l Bank of Valdosta,* 349 F. 2d 71 (5th Cir. 1965). The issue in that case, also, was not the issue in the instant case. In the *Jackson* case, a State Superintendent of Banks sought a declaration that a national bank could not lawfully open a drive-in banking facility 281 feet away from its main office, and separated from that office by an alley and several buildings which were not owned by the Bank. The Comptroller of the Currency felt that his approval to open

the drive-in window was not necessary since, in his view, the drive-in window was not a branch at all, but was an extension facility of the main office. The Court found against the national bank, holding that the national bank was bound by State law in this respect, and a State bank could not open such a drive-in window. The *Jackson* holding would be applicable in the instant case only if a State bank located in Ogden could not establish a branch. This, however, is not the case. In fact, State banks can establish branches in Ogden.

National Bank of Detroit v. *Wayne Oakland Bank,* 252 F. 2d 537 (6th Cir., 1958), cited at pages 9, 34 and 45 of Respondent's brief, is even less applicable than *Gidney* or *Jackson.* The crucial element in the *Wayne Oakland* case was neither "location" nor "method", but "time". At the time the National Bank of Detroit wanted to open a branch in Troy, Michigan, no State bank could establish a branch there under any circumstances. Since this was so, the Court held that neither could a national bank do so. The national bank had maintained that it had a right to establish a branch in Troy because a State bank had previously done so. The Court, however, cited 12 U.S.C. § 36, that a national bank may establish a branch, "* * * at any point within the State in which said [bank] is situated, if such establishment and operation are *at the time* authorized to State banks, et cet." (252 F. 2d at 540, emphasis, the Court's).

Suburban Trust Co. v. *National Bank of Westfield,* 222 F. Supp. 269 (D.N.J. 1963) is cited at pages 9 and 35 of Respondent's brief. This case relies upon the *Gidney* and *Wayne Oakland* cases, and, as we have seen those cases involved issues different from those present

in the instant case. The *Suburban Trust Co.* case also involved outside branches and 12 U.S.C. § 36(c)(2). In the *Suburban Trust Co.* case, the court, commenting on a provision of the pertinent New Jersey statute, said:

> "That limitation constitutes a *'restriction as to location'* within the meaning of 12 U.S.C. § 36(c) and is therefore incorporated in Section 36(c) and made applicable to * * * [the National bank seeking a branch]." (Emphasis added)

The case, therefore, went off on the legitimate issue of location, not whether or not New Jersey law could also prescribe the method by which the national bank branch could be established

South Dakota v. *National Bank of South Dakota,* 219 F. Supp. 842 (D.S.D. 1963), aff'd 335 F. 2d 444 (8th Cir., 1964), *cert. den.* 379 U.S. 970 (1965), cited at pages 9 and 35 of Respondent's brief, also relied upon the *Wayne Oakland* case. In *South Dakota* at page 446 of 335 F. 2d the court said:

> "12 U.S.C.A. § 36(c), so far as here material, authorizes national banks to establish branches in states where statutes specifically grant state banks power to operate branches subject to all restrictions on *location* imposed upon state banks by state law." (Emphasis added)

Again, the court recognized that the so-called "policy of equalization" referred to *location.* No mention was made of "method" or of "means".

Another of the cases relied upon by Respondent in its brief is *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.,* 116 U.S. App.

D.C. 285, 323 F. 2d 290 (1963), rev'd, 379 U.S. 411 1965). This case is cited by Respondent in connection with the arguments over standing and the weight to be given an administrative interpretation of the Comptroller of the Currency. It is interesting to note, however, that in the opinion of this Court reversing the Court of Appeals, the geographical nature of the limitation on the Comptroller was recognized when the Court said:

> "La. Rev. Stat. § 6:54 (1950) prohibits banks from opening branch offices in parishes other than their home parish, and these *geographical limitations* are made applicable to national banks by the Banking Act of 1933, 12 U.S.C. § 36(c)(2) (1958 ed.)." (Emphasis added) 379 U.S. 411, 13 L. Ed. 2nd, 386, 390, f.n. 1.

CONCLUSION

Despite the impressive volume of cases cited in the brief of Respondent, the fact remains that, under the clear wording of the statute, the Comptroller acted properly in authorizing a branch to Petitioner because the establishment and operation of branches in Ogden by Utah State banks were and are expressly authorized to State banks by Utah Code Annotated, 1953, Sec. 7-3-6. Nowhere does the law state that the Comptroller, in addition to the requirements of that statute, may also not authorize the establishment of a branch unless it is established through the same method or means by which a State branch is established. Respondent is asking the Court to read this additional limitation on the Comptroller into 12 U.S.C. § 36(c). Respondent respectfully submits, however, that if national bank branches are to be further limited, and new conditions as to method added to the existing conditions concern-

ing location, it is the Congress, and not the courts, which should effect this change.

Respectfully submitted,

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October 1966.

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No. 51

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, a National Banking Association.
Petitioner,

vs.

WALKER BANK & TRUST CO., a corporation,
Respondent.

October Term 1966
No. 51

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, a National Banking Association.
Petitioner,

vs.

WALKER BANK & TRUST CO., a corporation,
Respondent.

October Term 1966
No. 51

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of the United States Supreme Court, Petitioner, The First National Bank of Logan, Utah, petitions for rehearing of the decision of the United States Supreme Court in the above entitled matter on December 12, 1966, on the question of the

District Court's jurisdiction to hear the case. Petitioner also respectfully suggests the Supreme Court may desire to further consider the second question on which the Writ of Certiorari was granted to the Tenth Circuit Court of Appeals.

STATEMENT OF THE CASE

In the District Court of Utah The First National Bank of Logan asked the Court to dismiss the action because the plaintiff, Walker Bank and Trust Company, had shown no present nor prospective damages by reason of the establishment and operation of The First National Bank's branch in Logan, Utah. The Court denied The First National Bank's motion (R. 36) and even though the same question was raised in the appeal to the Tenth Circuit Court of Appeals, the appellate Court also declined to rule on the question of jurisdiction (R. 57-58).

In its petition for writ of certiorari filed on January 4, 1966, The First National Bank of Logan asked the Supreme Court to consider two questions:

1. *Does a Federal District Court have jurisdiction to hear a complaint by a state bank that a National bank's intra-city branch was illegally established and asking that its continued operation be enjoined where there was no showing that the amount in controversy exceeded $10,000 as the state bank presented no evidence that there was or would be damage to the state bank's business by the continued operation of the National bank's branch, and the defendant National bank's pleading denied that the state bank would be damaged?*

2. *Whether Congress in the National Banking Act, 12 U. S. C. Section 36 (c) intended that National Banks are subject to the identical restrictions of state law as state banks in establishing a branch within the limits of their own community?*

The United States Supreme Court granted the requested writ of certiorari on May 2, 1966. However, it is respectfully submitted that unless the silence of the Court on question number one indicates an affirmative answer, neither question certified has been answered in the Supreme Court's opinion of December 12, 1966.

ARGUMENT

Point I

THE DISTRICT COURT OF UTAH DID NOT HAVE JURISDICTION TO HEAR WALKER BANK'S COMPLAINT.

The opinion of the Supreme Court is silent on the question of jurisdiction even though the answer to this question is vital to every National Bank in deciding whether there are any advantages in continuing under the National Banking system, if, as indicated in the Court's opinion of December 12, 1966, National banks must comply with both State and Federal requirements on banking.

In the District Court of Utah, Walker Bank, the plaintiff, offered no evidence that it was or will be damaged by the First National Bank's drive-in window. As explained in petitioner's brief (see pages 14 to 26) this state of facts requires the District Court to dismiss the

plaintiff's complaint under 28 U. S. C. Section 1331 because of at least two decisions of the Supreme Court. KVOS v. Associated Press (1936) 299 U. S. 269, 57 S. Ct. 197, 81 L. ed. 183, and McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135, both held that the plaintiff must show damage in excess of the statutory amount ($10,000) before the Federal District Court has jurisdiction. In filing its complaint in the District Court the plaintiff, Walker Bank, relied on this section of the United States Code in order to obtain jurisdiction of the Federal District Court, but it was unable to show any damage as a result of the operation of The First National Bank's drive-in window nor was it able to show any prospective damage by the operation of such additional service to the customers of The First National Bank.

Does the silence of the Supreme Court on this question mean that the decisions in these two cases are no longer law? Does the silence of the Supreme Court mean that Federal District Courts can assume jurisdiction in any case involving the laws of the United States just by refusing to discuss the jurisdiction issue when raised by one of the parties? Apparently Court's have the power to disregard the question of jurisdiction because neither the Utah District Court in its opinion reported at 234 F. Supp. 74 (R. 37-46), nor the Tenth Circuit Court of Appeals in its opinion reported at 352 F. 2d 90 (R. 48-58), nor the United States Supreme Court opinion of December 12, 1966, mentions the question of jurisdiction.

If Federal Courts can ignore the question of jurisdiction, then it seems that citizens no longer have equal

rights under the law as a Court can choose which cases it will hear and which questions it does not want to consider just by mentioning or failing to mention the question of jurisdiction. And Congress has lost the power to prescribe limits for jurisdiction if a District Court can by remaining silent on the question, assume jurisdiction of a case involving less than $10,000 in damages if it wants to consider the case.

If any person can sue a National Bank in a Federal District Court without showing possible damage in the amount of $10,000, small country National banks may be burdened with defending actions in distant Federal Courts everytime they are involved in a transaction arising out of the National Bank Act. The expense of litigation alone may be sufficient reason to convert to a State bank.

If the silence of the Supreme Court in its December 12, 1966, opinion on the answer to the first question certified in this case indicates an affirmative answer to question number one, then without an opinion, the Supreme Court has repealed 28 U. S. C. Section 1348 giving District Courts jurisdiction by reason of the National Bank Act only in suits by the United States, or its officers, or by a National bank against the Comptroller of the Currency. Because if the District Courts have jurisdiction in any suit by any person involving a National Bank and the National Bank Act, without first showing that the jurisdictional amount of $10,000 is present, then there is no reason for 28 U. S. C. Section 1348.

We respectfully suggest that because the United States Supreme Court has always respected the will of

Congress with respect to jurisdiction and venue of Federal District Courts, that a rehearing should be granted on the question of jurisdiction in this case.

Point II

THE SUPREME COURT'S OPINION DOES NOT CLEARLY ANSWER THE QUESTION WHETHER NATIONAL BANKS ARE SUBJECT TO ALL RESTRICTIONS OF STATE LAW IN SEEKING TO ESTABLISH A BRANCH.

The provisions of subdivision (1) of 12 U. S. C. Section 36 (c) do not specifically incorporate any restriction of State law on branching except to state that state banks must be expressly authorized to branch in the city where the National bank is located before a National bank can branch. The question certified to the Supreme Court was whether this provision incorporates all restrictions of State law.

The opinion of the Supreme Court does not answer this question but states that the words used by Congress:

> " . . . if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . "

means that:

> " . . national branch banking is not only limited to those States the law of which permits it, but 'only to the extent that state laws permit branch banking'."

It is clear that the language of Congress does not specifically incorporate any particular type of restriction on branching within the community where the National bank is located. In branching outside the community Congress said that National banks are subject to restrictions of state law as to location and restrictions of state law as to capital. If National banks can branch outside of their community "only to the extent that state laws permit branch banking" then the two restrictions of State law specifically mentioned by Congress in subdivision (2) of the statute are redundant. It would seem the legislative process is sufficiently difficult without the legislators being required to carefully guard their use of language for fear such language even though not written into the final act will repeal language or will make redundant language actually written in the final act.

Congress specifically included two restrictions on branching within the community which applied regardless of state law. A restriction as to population and as to capital (see Petitioner's Brief p. 30). If the purpose of the National Branch Banking Act was to put National banks on an equal competitive basis with State banks (which purpose we think is clearly stated by the legislative history of the act) then by imposing additional restrictions on National banks Congress was specifically acting contrary to its legislative intent if it also intended National banks to be subject to *all* restrictions of State law in addition to the Federal requirements.

As is discussed on pages 39 and 40 of Petitioner's brief one of the primary concerns of Congress was to

prevent giant banks from taking the assets from the country to build up the large cities. One needs to only read the newspapers to appreciate the wisdom of Congress in trying to preserve the financial centers of small towns in order to avoid the present problems of overcrowded large cities. In order to protect National banks from being required to convert to State banks to protect their competitive position, Congress passed the McFadden Act which permitted National banks to branch in their own communities if State banks could branch there. As stated in petitioner's brief (p. 42-45) the cumulative effects of the statute will put National banks more nearly on a par with State banks.

It is not clear from the opinion of the Supreme Court whether this clear intent of Congress has now been superseded. Since no express restrictions of state law are incorporated in subdivision (1) of 12 U. S. C. Section 36 (c), it seems logical that either all restrictions of state law are incorporated or no restrictions of state law are incorporated other than state banks must have the right to branch in the community at the time the National bank seeks to branch. In reversing the Utah District Court the Tenth Circuit Court of Appeals rejected the District Court's reasoning that Congress intended only that State banks must be authorized to branch in that community before National banks can branch. In affirming the Tenth Circuit Court of Appeals it seems the Supreme Court is saying that National banks are not only subject to all regulations and restrictions of the Comptroller of the Currency, but they must also comply with State Bank Commissioner restrictions and regulations as well.

It is clear that if State banks are not expressly authorized to branch in Logan, Utah, unless they take over an existing bank, they are also not expressly authorized to branch in Logan, Utah, unless they obtain the approval of the State Bank Commissioner. For the Comptroller of the Currency cannot "pick and choose what portion of the law binds him."

The Supreme Court says that its decision assures competitive equality to State and National banks. This statement will be challeneged by any bank who has spent three months of preparing studies and forms in order to meet the very exacting requirements of the Comptroller of the Currency and has then subjected itself to a rigid three day examination by a National Bank examiner (R. 17) before it could obtain approval to establish a drive-in window to meet the competition of a state bank. To now say it must also comply with all the restrictions of the State Bank Commissioner is telling the National bank that it is far easier to convert to a State bank to obtain a drive-in window than it is to meet the requirements of both State and National Bank Administrators before such a window can be established.

On pages 42-45 of Petitioner's brief there is a comparison of whether the decision of the District Court or that of the Tenth Circuit Court of Appeals gives National banks competitive equality with state banks. We suggest that the Court carefully examine this comparison. We respectfully submit that Congress has determined that the strength of the Federal Reserve system lies in the compulsory requirement that National Banks remain a

member of that system. If the Court's opinion is going to cause National banks to revert to their position of the 1920's and decide that for their own economic self interest they must convert to State banks, we may be faced with the same problems the McFadden Act sought to avoid.

We respectfully request the Supreme Court to grant a rehearing not only on the question of jurisdiction which was not discussed, but also on the second question of restrictions of state law on National bank branching in order that the full impact on banking and the National economy may be discussed.

Respectfully submitted,

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The First National Bank of Logan

CERTIFICATE OF COUNSEL

I, Theodore S. Perry, counsel for Petitioner, The First National Bank of Logan, Utah, hereby certify that the foregoing petition for rehearing of the above entitled matter is presented in good faith and not for delay.

Theodore S. Perry
Attorney for Petitioner
The First National Bank of Logan, Utah

SUPREME COURT OF THE UNITED STATES

Nos. 51, 73, AND 88.—OCTOBER TERM, 1966.

The First National Bank of Logan, Utah, Petitioner, 51 *v.* Walker Bank and Trust Company.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
First Security Bank of Utah, N. A., Petitioner, 73 *v.* Commercial Security Bank.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
James J. Saxon, Comptroller of the Currency, Petitioner, 88 *v.* Commercial Security Bank.	

[December 12, 1966.]

MR. JUSTICE CLARK delivered the opinion of the Court.

These cases involve the construction of those portions of the National Bank Act, 44 Stat. 1228, 12 U. S. C. § 36 (c), which authorize a national banking association, with the approval of the Comptroller of Currency, to establish and operate new branches within the limits of the municipality in which the bank is located, if such operation is "at the time expressly authorized to state banks by the law of the State in question." [1] Two na-

[1] The National Bank Act, 44 Stat. 1228, 12 U. S. C. §§ 36 (c) (1) and (2) provides:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in

tional banks with their main banking houses in Logan and Ogden, Utah, respectively, seek to open branches in those municipalities. The Utah statute prohibits Utah banks, with certain exceptions not here relevant, from establishing branches except by taking over an existing bank which has been in operation for not less than five years. Utah Code Ann., Tit. 7, c. 3, § 6 (1953, as amended).[2] In No. 51, *First National Bank of Logan* v. *Walker Bank and Trust Co.*, the petitioner seeks to establish a new branch in Logan, where its principal banking house is located, without taking over an established bank. The District Court approved its doing so but the Court of Appeals reversed. 352 F. 2d 90 (C. A. 10th Cir.). In No. 73, *First Security Bank of Utah, N. A.* v. *Commer-*

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question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

[2] Utah Code Ann., Tit. 7, c. 3, § 6 (1953, as amended) provides:

"*7-3-6. Business conducted at banking house—Branching of offices—Violation of section a misdemeanor.*—The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

. . . . .

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

cial Security Bank, and No. 88, *Saxon* v. *Commercial Security Bank,* First Security seeks to establish a new branch in Ogden, in which its home office is situated, without taking over an established bank. The District Court held that state law must be complied with, 236 F. Supp. 457, and the Court of Appeals affirmed in a judgment, without opinion, citing *First National Bank of Logan, supra.* In view of a conflict between these holdings and the decision in *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267 (C. A. 4th Cir.) we granted certiorari, and consolidated the three cases for argument. 384 U. S. 925. We affirm the judgments.

1. *The Facts.*

In No. 51, the petitioner maintains its principal banking house in Logan, Utah, which is a second class city under Utah law (Utah Code Ann., Tit. 10, c. 1, § 1 (1953, as amended)), and is therefore subject to § 7–3–6 of the Utah Code, *supra.* It applied to the Comptroller of the Currency for a certificate to establish an "inside" branch office in Logan. At the time of the application there were no other banks with their main banking offices in Logan. However, there were two branches of banks whose home offices were situated outside of Logan, one of which was the respondent's, Walker Bank and Trust Co., whose home office was located in Salt Lake City. After a hearing, the Comptroller ordered the certificate issued. The respondent subsequently filed this suit seeking a declaratory judgment and injunctive relief against the Comptroller and First National claiming the action of the Comptroller to be void since the proposed branch was not taking over an established bank in Logan, as required by Utah law. The District Court dismissed the complaint. It found "express authority" under Utah law for state banks to establish

branch offices in Logan, relying on the general authority of the statute and holding that the subsequent conditions, such as the acquisition of another bank, did not "change the express authority into a lack of authority on the part of State banks or a lack of a statutory expression of such authority, and does not add to the Federal statute a requirement that compliance be made by National banks with all State conditions." 234 F. Supp. 74, n. 8. The Court of Appeals reversed, holding that the Congress in enacting § 36 (c)(1) acceded to state law and created "a competitive equality between state and national banks." Finding that the trial court's interpretation was to the contrary, it declared "the proper approach is for the Comptroller to look at all the State law on branch banking, not just part of it." 352 F. 2d 90, 94.

In Nos. 73 and 88, the First Security Bank of Utah, a national bank, applied for a certificate from the Comptroller to establish a branch bank in Ogden, where it maintained its principal banking house. Its proposal was to open a new branch and not to take over an existing bank in Ogden. Under Utah law, Ogden is also a second class city and the "take over" provision of § 7–3–6, *supra,* was therefore applicable. Two other banks have their main offices in Ogden. After the Comptroller approved the issuance of the certificate, respondent filed suit in the District Court of the United States for the District of Columbia asking for injunctive and other relief. The District Court imposed all of the restrictions of § 7–3–6 of Utah law to the establishment of national banks and the Court of Appeals of the District of Columbia Circuit affirmed, by a judgment without opinion, but cited the opinion of the 10th Circuit, *First National Bank of Logan, Utah* v. *Walker Bank and Trust Co., supra.*

2. *The National Bank Act: Its background.*

There has long been opposition to the exercise of federal power in the banking field. Indeed, President Jefferson was opposed to the creation of the first Bank of the United States and President Jackson vetoed the Act of Congress extending the charter of the second Bank of the United States. However, the authority of Congress to act in the field was resolved in the landmark case of *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). There Chief Justice Marshall, while admitting that "it does not appear that a bank was in the contemplation of the framers of the Constitution," held that a national bank could be chartered under the implied powers of the Congress as an instrumentality of the Federal Government to implement its fiscal powers. The paramount power of the Congress over national banks has, therefore, been settled for almost a century and a half.

Nevertheless, no national banking act was adopted until 1863 (12 Stat. 665), and it was not until 1927 that Congress dealt with the problem before us in these cases. This inaction was possibly due to the fact that at the turn of the century, there were very few branch banks in the country. At that time only five national and 82 state banks were operating branches with a total of 119 branches. By the end of 1923, however, there were 91 national and 580 state banks with a total of 2,054 branches.[3] The Comptroller of the Currency, in his Annual Report of 1923, recommended congressional action on branch banking. The report stated that if state banks continue to engage "in unlimited branch banking, it will mean the eventual destruction of the national banking system. . . ." H. R. Doc. No. 90, 68th Cong., 1st Sess., 6 (1924). Soon thereafter legislation was introduced to equalize national and state branch

[3] Board of Governors of the Federal Reserve System, Banking Studies 15, 428 (1941).

banking. The House Report on the measure, H. R. Rep. No. 83, 69th Cong., 1st Sess., 7 (1926), stated among other things:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal Reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws."

This bill failed to pass in the Senate and, although Congress continued to study the problem, it was not until 1927 that the McFadden Act was adopted. The bill originated in the House and, in substance, proposed that both national and state banks be permitted to establish "inside" branches within the municipality of their main banking facilities in those States that permitted branch banking at the time of the enactment of the bill. H. R. Rep. No. 83, 69th Cong., 1st Sess., 4–5 (1926). The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching. The Senate Report concluded that the Act should permit "national banks to have branches in those cities where State banks are allowed to have them under State laws." S. Rep. No. 473, 69th Cong., 1st Sess., 14 (1926). In the subsequent Conference Committee, the Senate position was adopted. State banks which were members of the Federal Reserve System were also limited to

"inside" branches. A grandfather's clause permitted retention of branches operated at the date of enactment. H. R. Rep. No. 1481, 69th Cong., 1st Sess., 6 (1926). The Act was finally passed on February 25, 1927, and became known as the McFadden Act of 1927, taking its name from its sponsor, Representative McFadden. At the time of its enactment he characterized it in this language:

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and *competitive equality* has been established among all member banks of the Federal reserve system." (Emphasis supplied.) 68 Cong. Rec. 5815 (1927).

During the economic depression there was much agitation that bank failures were due to small undercapitalized rural banks and that these banks should be supplanted by branches of larger and stronger banks. The Comptroller of the Currency advocated that national banks be permitted to branch regardless of state law. Hearings before a Subcommittee of the Senate Committee on Banking and Currency pursuant to S. Res. No. 71, 71st Cong., 3d Sess., 7–10 (1931). Senator Carter Glass held a similar belief and introduced a bill that would authorize national banks to organize branches irrespective of state law beyond and "outside" the municipality of its principal banking house. His proposal was strenuously opposed and was eventually defeated. It was not until the Seventy-third Congress that the Banking Act of 1933 was adopted. Senator Glass, the ranking member of the Senate Committee on Banking and Currency and the dominant banking figure in the Congress, was sponsor of the Act. In reporting it to the Senate for passage, he said, the Act "required that the estab-

lishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks." 77 Cong. Rec. 3726 (1933). In a colloquy on the floor of the Senate with Senator Copeland as to the purpose of the Act (with reference to branch banking by national banks), Senator Glass said that it would be permissible "in only those States the law of which permit branch banking, and only to the extent that State laws permit branch banking." Moreover, to make it crystal clear, when Senator Copeland replied that "it permits branch banking only in those States where the State laws permit branch banking by State banks," Senator Glass was careful to repeat: *"Only in those States and to the extent that the State laws permit branch banking."* (Emphasis added.) 76 Cong. Rec. 2511 (1933). Remarks of other members of Congress also indicate that they shared the understanding of Senator Glass. For example, Senator Vandenberg stated that § 36 (c)(1) provides "that the branch banking privilege so far as national banks are concerned shall follow the status established by State law in respect to the State privilege." 76 Cong. Rec. 2262 (1933). Likewise, Senator Long, who had joined a filibuster against an earlier version of the bill, stated at final passage that "we have only undertaken to secure equal treatment for State banks" and that the bill had substantially achieved that result. 77 Cong. Rec. 5862 (1933). In similar tone, Representative Bacon stated that branches of national banks may be established provided "this is permitted by laws of that state and *subject to them.*" (Emphasis added.) 77 Cong. Rec. 3949 (1933). And Representative Luce, a member of the Conference Committee, reported to the House:

> "In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and

> sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where States make the competition possible by letting their institutions have branches." 77 Cong. Rec. 5896 (1933).

As finally passed, the Act permitted national banks to establish outside branches if such branches could be established by state banks under state law. It is well to note that the same Act also removed the restriction on outside branch banking by state member banks previously imposed by the McFadden Act.

3. *The Policy of Competitive Equality.*

It appears clear from this résumé of the legislative history of § 36 (c)(1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned. Both sponsors of the applicable banking Acts, Representative McFadden and Senator Glass, so characterized the legislation. It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption. To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864. See *Lewis* v. *Fidelity and Deposit Co.*, 292 U. S. 559, 565–566 (1934); *McClellan* v. *Chipman*, 164 U. S. 347 (1896); *Chase Securities Corp.* v. *Husband*, 302 U. S. 660 (1938); *Anderson Natl. Bank* v. *Luckett*, 321 U. S. 233 (1944).

The Comptroller argues that Utah's statute "expressly authorizes" state banks to have branches in their home municipalities. He maintains that the restriction, in the

subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the law of which permits it, and even there "only to the extent that state laws permit branch banking." Utah clearly permits it "only to the extent" that the proposed branch takes over an existing bank.

The Comptroller also contends that the Act supersedes state law only as to "whether" and "where" branches may be located and not the "method" by which this is effected. We believe that where a State allows branching only by taking over an existing bank, it expresses as much "whether" and "where" a branch may be located as is a prohibition or a limitation to the home office municipality. As to the restriction being a "method," we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of § 36 (c)(1) and (2), regardless of the tag placed upon it.

Affirmed.